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No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CEDAR COAL COMPANY,

Petitioner,

v.

JEWELL SHUFF, SURVIVOR OF PAUL SHUFF,

Respondent,

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
U. S. DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Can the rule of judicial deference to agency interpretation of a regulation be properly applied without reference to the contemporaneity and consistency of the agency's interpretation and its consistency with the agency's manifest purpose in making the regulation?

2. Even if the rule of deference can properly be so applied, can the criterion in 20 C.F.R. § 718.205(c) for award of black lung benefits to survivors where pneumoconiosis was a "substantially contributing cause or factor leading to the miner's death" be properly interpreted as requiring an award whenever pneumoconiosis hastened death, however briefly, slightly, or insubstantially?

LIST OF PARTIES AND RULE 29.1 STATEMENT

Jewell Shuff (''Mrs. Shuff'' or ''the claimant'') is a claimant for federal black lung benefits under the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901, *et. seq.* (''the Act''). She was the petitioner in the court of appeals and is the respondent here. Cedar Coal Company (''Cedar Coal'') is the mine owner that last employed Paul Shuff, the claimant's deceased husband (''the miner''). Cedar Coal was the respondent in the court of appeals and is the petitioner here.

The Director, Office of Workers' Compensation Programs, United States Department of Labor (''Director'') is the official assigned general responsibility by the Secretary of Labor for the administration of the federal black lung benefits program. The Director, by delegation, is a statutory party in interest in black lung claims. 30 U.S.C. § 932(k). The Director was a respondent in the court of appeals and is a respondent here.

Cedar Coal is a wholly-owned subsidiary of Appalachian Power Company, which in turn is a wholly-owned subsidiary of American Electric Power Company, Inc.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES and REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	4
I. The Legislative History of the Black Lung Benefits Act Belies the Fourth Circuit's Interpretation of 20 C.F.R. § 718.205(c)	4
II. The Fourth Circuit Employed An Exaggerated and Simplistic Standard of Deference to the Director's Interpretation of 20 C.F.R. § 718.205(c)	7
A. The Director's interpretation fails the test of consistancy in application	9
B. The Director's Interpretation Does Not Sensibly Conform to the Purpose of 20 C.F.R. § 718.205(c)	11
C. The Director's Interpretation Does Not Sensibly Conform to the Wording of 20 C.F.R. § 718.205(c)	16
CONCLUSION	19

TABLE OF AUTHORITIES

	PAGE
Cases	
Bonessa v. *U. S. Steel Corp.*, 884 F.2d 726 (3d Cir. 1989)	8,16
Bowles v. *Seminole Rock Co.*, 325 U.S. 410 (1945)	7
Compton v. *Inland Steel Coal Co.*, 933 F.2d 477 (7th Cir. 1991)	16
Director, OWCP v. *Mangifest*, 826 F.2d 1318 (3d Cir. 1987)	8
Ehlert v. *United States*, 402 U.S. 99 (1971)	8
Hawkins v. *Director, OWCP*, 907 F.2d 697 (7th Cir. 1990)	10,16,18
Lollar v. *Alabama By-Products Corp.*, 893 F.2d 1258 (11th Cir. 1990)	10,16
Lukosevicz v. *Director, OWCP*, 888 F.2d 1001 (3d Cir. 1989)	2,7,8,15,17
Lyng v. *Payne*, 476 U.S. 926 (1986)	8
Mangus v. *Director, OWCP*, 882 F.2d 1527 (10th Cir. 1989)	9,11,16
Martin v. *OSHRC*, 1191 U.S. Lexis 1716 (1991)	8
Mullins Coal Co. v. *Director, OWCP*, 484 U.S. 135 (1987)	8,9
Northern Indiana Publ. Serv. Co. v. *Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U.S. 12 (1975)	8
Pauley v. *Bethenery Mines*, 1991 U.S. Lexis 3638 (1991)	7
Peabody Coal Co. v. *Director, OWCP*, 1992 U.S. Lexis 20199, (1992)	8
Robinson v. *Pickand Mather & Co./Leslie Coal Co.*, 914 F.2d 35 (4th Cir. 1990)	17

	PAGE
Tackett B.R.B. No. 91-1390 (April 23, 1992) (published) (App. ++, p. +)	9
Udall v. *Tallman,* 380 U.S. 1 (1965)	7
Statutes	
Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901, et. seq.	2,4,5
33 U.S.C. § 921(c)	2
Regulations	
20 C.F.R. § 410.490	5
20 C.F.R. § 718.202	2
20 C.F.R. § 718.204	17
20 C.F.R. § 718.204(a)	9,10,17,18
20 C.F.R. § 718.205	2,4,7,9,10,11 12,15,16,17,18
Federal Register	
47 Fed. Reg. 22674 (1982)	11,12
47 Fed. Reg. 22676 (1982)	12
48 Fed. Reg. 24276 (1983)	9,12,14
48 Fed. Reg. 24277 (1983)	13,14
48 Fed. Reg. 24278 (1983)	14
Miscellaneous	
127 Cong. Rec. at S15494 and H9792 (daily ed. Dec. 16, 1981)	12

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OPINIONS BELOW

The opinion of the court of appeals in Shuff v. *Cedar Coal Company* is reported at 967 F.2d 977 (4th Cir. 1992). (App. at ____.) The Order of the court of appeals denying a petition for rehearing filed by Cedar Coal is unreported. (App. at ____.) The Decision and Order of the Benefits Review Board, United States Department of Labor, is unreported. (App. at ____.) The Decision and Order-Awarding Benefits in Living Miner's Claim and Denying Benefits in Survivor's Claim issued by the administrative law judge is unreported. (App. at ____.)

JURISDICTION

The judgment of the court of appeals was rendered on June 18, 1992. A timely petition for rehearing was filed by Cedar Coal and was denied on July 16, 1992.

Jurisdiction was conferred on the court of appeals by the filing of a timely petition for review of the Decision and Order of the Benefits Review Board, in accordance with 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations involved in this case are reprinted in the Appendix:

1. 30 U.S.C. § 901(a).
2. 30 U.S.C. § 922(a)(2).
3. 20 C.F.R. § 718.205(c).

STATEMENT OF THE CASE

Paul Shuff was employed as an underground coal miner for at least 16 years, last working for Cedar Coal on April 19, 1983. On May 23, 1983 he filed a claim for federal black lung benefits under the Act. In June, 1983, the miner was diagnosed with pancreatic cancer. Shortly thereafter, the disease metastasized to his lungs and cervical nodes. He died in the hospital on July 28, 1983. The cause of death was identified as metastic carcinoma of the pancreas, although the immediate precipitating cause of death was pneumonia.

Mrs. Shuff filed a claim for benefits pursuant to the Act on August 18, 1983. Both the miner's and claimant's applications for benefits were denied by the Department of Labor on March 5, 1987 and appeals were taken to the Office of Administrative Law Judges. On August 10, 1989, Administrative Law Judge Hillyard issued a Decision and Order-Awarding Benefits in Living Miner's Claim and

Denying Benefits in Survivor's Claim. Specifically, Judge Hillyard found that the miner had established the presence of pneumoconiosis and was totally disabled due to the disease, relying primarily upon the medical opinion that "coal mine work at least played a partial role in the miner's disability respiratory condition." 20 C.F.R. §§ 718.202(a)(2) and (4) and 204(c)(4). The administrative law judge, however, considered a record substantiated by persuasive medical opinion that pneumoconiosis was not a significant contributing cause of the miner's death and concluded that the claimant had failed to establish entitlement pursuant to 20 C.F.R. § 718.205(c). The claimant appealed to the Benefits Review Board ("the Board") and Cedar Coal cross appealed on the miner's claim.

The Board affirmed the administrative law judge's decision on April 25, 1991. The claimant filed an appeal with the Fourth Circuit, contending that the administrative law judge and the Board applied too stringent a standard in determining whether pneumoconiosis was a substantial contributing cause of the miner's death, asserting that a condition which hastens death, *even slightly,* must be considered a substantially contributing cause of death under 20 C.F.R. § 718.205. Likewise, the Director, as respondent, espoused the same position, asserting that pneumoconiosis has substantially contributed to death if it has hastened death *in any way.* The Court of Appeals agreed, according substantial deference to the Director's interpretation and following the Third Circuit in *Lukosevicz* v. *Director, OWCP,* 888 F.2d 1001 (3d Cir. 1989). Consequently, the decision below was vacated and remanded for further consideration by the administrative law judge.

ARGUMENT

I.

THE LEGISLATIVE HISTORY OF THE BLACK LUNG BENEFITS ACT BELIES THE FOURTH CIRCUIT'S INTERPRETATION OF 20 C.F.R § 718.205(c).

The black lung benefits provisions of the Act have undergone three revisions since their original enactment in 1969.[1] The 1969 Act first established a two-part program for the payment of lifetime benefits to coal miners who were totally disabled by pneumoconiosis (black lung) and the survivors of miners who died due to the disease. Under Part B of Title IV of the 1969 Act, all claims for benefits filed before January 1, 1973 were to be filed with and adjudicated by the Secretary of Health, Education and Welfare. If entitlement to benefits were found, these claims were to be paid from general revenues. Under Part C of Title IV of the 1969 Act, claims filed after January 1, 1973 were to be filed under an approved state workers' compensation law.[2] However, if no such state law were approved, the claims were to be filed with and processed by the Secretary of Labor. However they were processed, these Part C claims were to be paid by the particular coal mine operator found to be liable. Each coal mine operator was required to secure the payment of benefits by either subscribing to an approved state fund, purchasing an approved insurance policy, or qualifying as a self-insurer with the Department of Labor. If no operator could be found liable, an approved claim was to be paid from general revenues at the direction of the Department of Labor. The coal-mine-

1. Part C of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, and as further amended by the Black Lung Benefits Revenue Act of 1981, and the Black Lung Benefits Amendments of 1981, 95 Stat. 1635.

2. 30 U.S.C. §§ 931-936 (1970). No state workers' compensation law has been approved by the Department of Labor to date.

operator-financed Part C program was initially designed to terminate entirely on December 3, 1976.

The black lung benefits provisions were extensively amended by the Black Lung Benefits Act of 1972.[3] These amendments were attributed to Congress' dissatisfaction with the Social Security Administration's high rate of claims denial, which in turn was deemed to be due to restrictive and conservative interpretation of the Act's eligibility criteria.[4] The 1972 Act, among other things, extended coverage to include surface workers and added other changes in entitlement. Federal liability was extended under Part B until December 31, 1982. Commencement of the Secretary of Labor's jurisdiction under Part C was postponed until June 30, 1973. The termination of Part C was extended to May 1984. Among the entitlement changes was the provision that survivors of a living miner totally disabled from pneumoconiosis who later died from a cause unrelated to pneumoconiosis were eligible for benefits. Prior to this change, survivors had to prove that the miner's death was due to pneumoconiosis.[5]

The 1972 amendments directed the Social Security Administration (''SSA'') to devise and promulgate medical standards and evaluatory criteria for determination of claims. SSA adopted ''interim standards'' applicable to claims subject to review or adjudication by that agency.[6] These interim regulations, 20 C.F.R. § 410.490, created presumptions of entitlement more favorable than anything in the statute. As a result, Part B approvals surged. When part C became effective, there were no state compensation programs approved; therefore, the Department of Labor began its

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3. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (codified at 30 U.S.C. § 901-941 (1976)).

4. S. Rep. No. 743, 92nd Cong. 2d Sess. 9-16, reprinted in 1972 U.S. Code Cong. and Ad. News 2305, 2317-20; H.R. Rep. No. 460, 92nd Cong. 1st Sess. (1971).

5. Amendments to § 401, 30 U.S.C. § 901 (1976).

6. 20 C.F.R. § 410.490 (1980).

implementation of Part C of the Act. At the same time that the number of Part B approvals was escalating at SSA, comparatively few Part C claims were being approved by the Department of Labor. This disparity is attributable in large part to SSA's more liberal eligibility criteria.

The 1978 amendments[7] expanded coverage under the Act and mandated extremely liberal eligibility criteria. All pending and previously denied claims under Part B and Part C were to be reviewed anew. The amendments created a Black Lung Disability Trust Fund financed by mandatory contributions from the coal industry to pay all claims not involving individual coal operator liability. The 1978 amendments dramatically increased black lung claim approvals, which led to a serious deficit in the Trust Fund, which was forced to borrow from general revenues.

The 1981 amendments[8] increased the tax on coal mined but, unlike the 1972 and 1978 amendments, did not expand coverage or liberalize eligibility criteria. To the contrary, the 1981 amendments significantly tightened eligibility criteria for claims filed on or after January 1, 1982. One of the changes was the elimination of the provision that allowed survivors to collect compensation when a totally disabled miner died from a cause unrelated to black lung. Congress returned to the 1969 standard that allowed survivor's benefits only when the death of the miner was due to pneumoconiosis. Both the legislative history of the 1981 amendments and the Director's stated purpose for the regulations promulgated thereunder recognized the Congressional intent to restrict eligibility.

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7. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95.239, 92 Stat. 95 (1978); Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-277, 92 Stat. 11 (1978).

8. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, 95 Stat. 1635 § 102, (codified at 26 U.S.C. 4121 (1981)).

II.

THE FOURTH CIRCUIT EMPLOYED AN EXAGGERATED AND SIMPLISTIC STANDARD OF DEFERENCE TO THE DIRECTOR'S INTERPRETATION OF 20 C.F.R. § 718.205(c)

The Fourth Circuit "agree[d] with *Lukosevicz,* for the reasons articulated therein" and therefore deferred to and adopted the Director's position. But in *Lukosevicz* v. *Director, OWCP,* 888 F.2d 1001 (3d Cir. 1989), the Third Circuit misapplied the rule of substantial deference by failing to attend to that rule's rationale and limiting conditions. In following *Lukosevicz,* the Court of Appeals below likewise misconceived and misapplied the deference rule.

The principle underlying judicial deference to agency interpretations is that judges should "respect legitimate policy choices" and "the exercise of judgment grounding policy concerns." *Pauley* v. *Bethenery Mines,* 1991 U.S. Lexis 3638 (1991). But when first proposed in *Lukosevicz,* the agency's interpretation was not professed to be based on any policy, whether of Congress or of the Department of Labor, but rather on the dictionary definitions of the words "substantial," "contributing" and "cause". 888 F.2d 1004. In the present case, too, the Director's interpretative argument is based not so much on policy as on supposed Congressional intent: any test of causation more stringent than the Director's "would frustrate Congress' intent by necessitating inquiry over the *degree* to which pneumoconiosis contributed to death." As is submitted in Part B below, this argument is manifestly inconsistent with the intent of Congress as rightly explained by the Director at the time when the regulation was made.

The conditions for judicial deference to agency interpretation of regulations are not fully stated in the two decisions of this Court relied on in *Lukosevicz,* 888 F.2d at 1006, and thus implicitly relied on in the present case, namely *Udall* v. *Tallman,* 380 U.S. 1, 16-17 (1965); *Bowles* v. *Seminole Rock Co.,* 325 U.S. 410, 413-14 (1945). The

relevant dicta in *Udall* and *Bowles* are cited and fully taken into account in the more recent cases followed by this Court in its fuller and most recent account of the deference rule, in *Martin* v. *OSHRC,* 1191 U.S. Lexis 1716 (1991):

> It is well established "that an agency's construction of its own regulations is entitled to substantial deference." *Lyng* v. *Payne,* 476 U.S. 926, 939 (1986); accord, *Udall* v. *Tallman,* 380 U.S. 1, 16-17 (1965). In situations in which "the meaning of [regulatory] language is not free from doubt," the reviewing court should give effect to the agency's interpretation so long as it is "reasonable," *Ehlert* v. *United States,* 402 U.S. 99, 105, 91 S. Ct. 1319, 28 L. Ed. 2d 625 (1971), that is, so long as the interpretation "sensibly conforms to the purpose and working of the regulations." *Northern Indiana Publ. Serv. Co.* v. *Porter County Chapter of Izaak Walton League of America, Inc.,* 423 U.S. 12, 15, 96 S. Ct. 172, 46 L. Ed. 2d 156 (1975).

1191 U.S. Lexis at 13. A factor bearing on the reasonableness of an agency's interpretation is the consistency or otherwise of the agency's application of that interpretation. *Id.* at 13, citing *Ehlert.*

In finding a duty to defer unless there be plain error or inconsistency with the regulation, the Third Circuit in *Lukosevicz*—and thus the Fourth Circuit below (and subsequently the Seventh Circuit following both decisions in *Peabody Coal Co.* v. *Director, OWCP,* 1992 U.S. App. Lexis 20199, p. 17, August 17, 1992) —completely overlooked the further conditions on that duty. Those further conditions were restated by this Court in *Martin.* They were impliedly recognized by the course of reasoning actually employed by this Court in cases such as *Udall, Bowles* and *Mullins Coal Co.* v. *Director, OWCP,* 484 U.S. 135 (1987). The Third Circuit clearly articulated them, in a form verbally different but substantially similar to the formulation in *Martin,* in careful judgments in *Director, OWCP* v. *Mangifest,* 826 F.2d 1318, 1323 (3d Cir. 1987); *Bonessa* v. *U.S. Steel Corp.,* 884 F.2d

726, 731 (3d Cir. 1989); and *Revak* v. *National Mines Corp.*, 808 F.2d 996 (3d Cir. 1986). As summarized in *Martin* the conditions are: consistency of the agency in articulating and applying its own interpretation; sensible conformity to purpose; sensible conformity to wording.

A. The Director's interpretation fails the test of consistency in application.

The Director's present interpretation of 20 C.F.R. § 718.205(c) fails the test of agency self-consistency in five ways.

(1) It was first advanced, not contemporaneously with the making of the regulation in May, 1983, but more than five years later.

(2) It is manifestly inconsistent with the explanations published by the Director in May, 1983: see 48 Fed. Reg. 24276, May 31, 1983 and Part B below.

(3) Even when argued for by the Director, it has been consistently rejected by the Department's own Benefits Review Board, whose judgments (even if not entitled to the same deference as is owed to a policy-maker) are counted for the purposes of assessing consistency of agency interpretation. See *Mullins Coal Co.* v. *Director, OWCP,* 484 U.S. 135, 159. The B.R.B. rejections of the Director's interpretation are: *Lukosevicz* B.R.B. No. 87-1599 (March 31, 1989) (unpublished); *Tackett* B.R.B. No. 91-1390 (April 23, 1992) (published).

(4) The Director's fundamental contention, that the regulation excludes "inquiry into the *degree* to which pneumoconiosis contributed to death," is radically inconsistent with the position maintained by the Director in 1988-1990 in defining the requisite causal nexus between pneumoconiosis and total disability under 20 C.F.R. § 718.204(a). In that context the Director maintained that the test was whether the disability was, *inter alia*, "substantially" aggravated by the pneumoconiosis. *See Mangus* v. *Director,*

OWCP, 882 F.2d 1527, 1530 (10th Cir. 1989). Indeed, the Director argued that the test of "substantial contributing cause" should be preferred to "simple contributing cause." *See Hawkins* v. *Director, OWCP,* 907 F.2d. 697, 701, 704 (7th Cir. 1990). The Director also contended that the test of *degree* imparted by the term "substantial" is desirable and proper since, if there were no question of degree, benefits might be awarded where pneumoconiosis "represented such a negligible or de minimis addition to the overall finding of total disability that it could not be said that the miner was entitled to benefits intended to compensate persons 'totally disabled due to pneumoconiosis'." *Id.* at 704. The statutory "due to" concept is common to the regulation at issue in *Mangus* and *Hawkins* and the regulation at issue here [see 20 C.F.R. § 718.204(a) and § 718.205(a)], and there is no reason why the argument advanced by the Director in *Mangus* and *Hawkins* should not be applicable here. Indeed, it is applicable here *a fortiori,* since here, unlike in 20 C.F.R. § 718.204(a), the concept that the causal contribution must be "substantial" is expressed on the face of the regulation and is, moreover, adopted from congressional language expressly relied upon in promulgating 20 C.F.R. § 718.205(c). The differing postures of the Director are, therefore, simply inconsistent.

(5) The Director's positions on the question of degree of causal nexus under a regulation so closely related to § 718.205(c) as § 718.204(a) have been not only inconsistent but also shifting and uncertain. In *Lollar* v. *Alabama By-Products Corp.,* 893 F.2d 1258 (11th Cir. 1990), the Director first urged a very stringent requirement that disablement be due to pneumoconiosis "in and of itself", but then in oral argument and a post-argument brief shifted to a position which urged the court to rely on four cases recently decided by the Third, Fourth, Sixth, and Tenth Circuits, apparently overlooking the fact that those four cases differed sharply amongst themselves on the question of whether the required causal contribution need or need not be "substantial." *Id.* at

1263. Moreover, in 1989, the Director had urged a still different position on the causal requirement on the same regulation. *Mangus* v. *Director, OWCP,* 882 F.2d 1527, 1530 (10th Cir. 1989).

The Petitioner submits that this Court should now rule that circuits err when they treat the test of "plain error" or "inconsistency with the regulation" as if that test could be applied without considering the self-consistency of the agency in its own interpretations and the agency's own manifest purposes in making the regulation.

The Petitioner further submits that the interpretation of 20 C.F.R. § 718.205(c) now proposed by the Director and adopted by the Third, Fourth and Seventh Circuits is indeed plainly erroneous and manifestly inconsistent with the regulation itself, for the reasons given below. The Petitioner, however, frames those reasons in terms of the more adequate criteria set out in *Martin.*

B. THE DIRECTOR'S INTERPRETATION DOES NOT SENSIBLY CONFORM TO THE PURPOSE OF 20 C.F.R. § 718.205(c)

The manifest purpose of the regulation as made by the Secretary of Labor in May, 1983, was to require that the degree of causal relationship (contribution) of pneumoconiosis to death should be assessed, so that survivor's benefits would be payable only if that relationship (contribution) was substantial.

The Department made clear the regulation's purpose by a full process of consultation. In the months prior to May, 1982, Department personnel met with representatives of coal mining and consuming organizations, insurance groups, the United Mine Workers and black lung claimants' organizations, with a view to developing new regulations. 47 Fed. Reg. 22674. When publishing draft regulations on May 25, 1982, the Department particularly requested the submission of formal comments (by way of detailed statements including rationale and listing of points and

authorities relied upon) in two areas, and above all on precisely the issue in this case: the definition of "death due to pneumoconiosis" in proposed rule § 718.205. "Commenters are requested to focus upon the statements of Chairmen Hatch and Perkins contained in the Congressional Record for December 16, 1981, 127 Cong. Rec. at S15494 and H9792 [daily ed.]." 47 Fed. Reg. 22674. The Department's intent to give effect to those statements was thus made manifest at the outset. It was confirmed by the repeated use of the Hatch-Perkins phrase "substantially contributing cause" in proposed rule § 718.205(d) [now (c)]. See 47 Fed. Reg. 22676.

Comments were received from 16 sources, including individuals and groups of the types mentioned above, and others, such as individual attorneys who represent claimants seeking black lung benefits, and a medical group. The Department's published responses to these comments made clear its purpose in settling on the revised text of § 718.205(c) [formerly (d)].

Its first purpose was to provide a clear definition of the statutory concept of "death due to pneumoconiosis":

> Several of the comments received suggest that no new regulatory definition is needed to [that] concept . . . as applied to survivors' claims filed on and after January 1, 1982. The Department does not agree. The words do not speak clearly and unambiguously for themselves. The causal nexus of 'due to' has been given a broad variety of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other. Therefore, some guidance is required as to the intended meaning of the words in this specific context.

48 Fed. Reg. 24276.

The "required guidance" was provided by the Department in § 718.205(c), and at the heart of this guidance was the repeated phrase "substantially contributing cause." In declaring this phrase to be "an unworkable standard," the court of appeals below (App. ____) is not so much deferring to

the Director (whose Brief did not make this claim), as rather rejecting the deliberate and considered judgment of the Secretary of Labor in 1983. It is not so much "refining" as rejecting the interpretive guidance given then by the Director.

A second purpose of the 1983 regulatory amendments was to confirm the Department's earlier

> decision to base the proposed version of this section primarily upon the Hatch-Perkins statement. After careful review of the numerous comments received concerning this statement and its relationship to the remainder of the statement and its relating to this provision of the 1981 amendments, the Department remains convinced of the correctness of the decision.

48 Fed. Reg. 24277.

Accordingly,

> Paragraphs [718.205](c)(2) and (c)(4) as now promulgated are derived from the Hatch-Perkins statement. One significant change from the proposed version is the elimination of the words "significantly related to or aggravated by" as forms of causation which were included in the proposed version. The deletion is based upon a consideration of the comments . . . and also upon the fact that those terms are not used in the Hatch-Perkins statement concerning the types of causal nexus which they intended to be compensable on survivors' claims filed after December 31, 1981.

48 Fed. Reg. 24277.

The key words of the Hatch-Perkins statement are, of course, the repeated phrase, "substantially contributing factor." The Fourth Circuit's decision below is tantamount to saying that the Secretary of Labor ought to have eliminated the words of the Hatch-Perkins statement and retained the words which the Secretary in fact eliminated.

A third purpose was to place the causal nexus *within*, and not at either extreme of, the "spectrum" already mentioned:

> . . . a broad variety of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other.

48 Fed. Reg. 24276.

Having used the phrase "contributing cause" to define one end of the spectrum of possible meanings, the Department carefully insisted throughout on the expressly qualified phrase "*substantially* contributing cause" and eliminated all weaker concepts such as "significantly related to." It remarked that the Hatch-Perkins statement "provides a more detailed explanation of the intended meaning" than such [weaker] phrases as "a causal connection" and "related to." 48 Fed. Reg. 24278. This explanation, adopted by the Secretary in the regulation, places the required causal nexus *at some distance from* the most lenient end of the spectrum.

The Brief which the Director filed with the Fourth Circuit in this case quoted two sentences from 48 Fed. Reg. 24277, where the Department noted the contrast in the Hatch-Perkins statement between a cause of death "unrelated to pneumoconiosis" and a cause of death which, though not unrelated was also not "the principal, sole, primary or proximate cause" of death. The Brief continues immediately:

> Thus, the Director believes that pneumoconiosis substantially contributes to death if it serves to hasten death in any way. In our view, any more stringent standard would frustrate Congress' intent by necessitating inquiry over the *degree* to which pneumoconiosis contributed to death.

The Brief's word "Thus . . ." signals what is in fact a pure *non sequitur*. Between "unrelated" and "principal or sole or primary or proximate" there lies not just one position—"contributes" or "hastens in any way"—but several, including "contributes substantially" or "hastens to a substantial degree." The Brief significantly omits the sentence immediately following the two sentences quoted from 48 Fed. Reg. 24277, where the Department in 1983 chose to speak not of contributing or hastening, but "*substantially* contributing":

> Considered in this light, the example [given in the proposed rule] was intended to illustrate those basic concepts in the following manner: the survivor's claim is compensable if the evidence demonstrates that pneumoconiosis was a *substantially* contributing cause of death even though the principal cause of death was pneumonia.

(emphasis added.) In short, every part of the record of the making of 20 C.F.R. § 718.205(c) confirms that it is inconceivable that the Secretary of Labor intended to use "substantially contributes" as interchangeable with "contributes" or "hastens." It also confirms that the Director's present flight from assessments of *degree* of contribution is a flight from the manifest purpose of the regulation made in 1983.

Final confirmation of that purpose is provided by a fact completely overlooked by the Director and the courts of appeals in *Lukosevicz* and below. With respect to pre-1982 claims, the regulation applicable to a case such as Shuff's provided and provides that death would be considered due to pneumoconiosis—

> (b) . . .
> (2) Where death was due to multiple causes including pneumoconiosis and it is not medically feasible to distinguish which disease caused death or the extent to which pneumoconiosis *contributed* to the cause of death."

20 C.F.R. § 718.205(c) (emphasis added.)

This criterion was abolished with respect to post-1981 claims, and was directly superseded by the new criterion of "substantially contributing cause" in § 718.205(c)(2) & (4). The replacement of reg. (b)(2) by reg. (c)(2) is explicable only if it was intended quite deliberately and precisely to necessitate (for all post-1981 claims) an inquiry into the *extent of contribution* to death.

The same, *mutatis mutandis*, is true of the replacement of reg. (b)(5) by reg. (c)(4). The former had treated death as due to pneumoconiosis where the cause of death was "significantly

related to or aggravated by pneumoconiosis.'' The latter, as has been stated above, eliminates all references to ''relation'' or ''aggravation'' and prefers the obviously more demanding concept of ''substantially contributing cause.''

In each case, the 1983 amendment replaced a regulation which, for pre-1982 cases, made unnecessary any inquiry into ''extent'' (= ''degree'') of contribution in cases of multiple causation. In each case, the new provision employed a qualifying adjective intended and bound to make such an inquiry necessary.

Thus the Department's explanations were confirmed by the substance and form of its amendments. The Secretary's clear purpose was to embrace the need to make investigations into the *degree or extent* to which pneumoconiosis contributes to death, taking into account all other contributing causes.

C. THE DIRECTOR'S INTERPRETATION DOES NOT SENSIBLY CONFORM TO THE WORDING OF 20 C.F.R. § 718.205(c)

Common sense and legal usage are inconsistent with the notion that the word ''substantially'' makes no difference to the reference and effect of ''contributes.'' It may not be obvious just how great is the difference it makes, but it is certain that the qualifying adverb makes a substantial difference.

The Seventh, Tenth and Eleventh Circuits have all recently held, in the context of 20 C.F.R. § 718.205(a), that ''substantially contributes'' is a phrase which sets a higher, more demanding, less lenient standard than ''contributes.'' *Mangus* v. *Director, OWCP,* 882 F.2d 1527, 1531-32 (10th Cir. 1989). *Lollar* v. *Alabama By-Products Corp.,* 893 F.2d 1258, 1265 (11th Cir. 1990). *Hawkins* v. *Director, OWCP,* 907 F.2d 697, 705-706 (7th Cir. 1990). *Compton* v. *Inland Steel Coal Co.,* 933 F.2d 477, 482 (7th Cir. 1991). The Third Circuit has deliberately preferred ''substantially contributes'' to ''contributes'' but has not clearly faced the question whether the former differs substantially from the latter. *Bonessa* v. *U.*

S. Steel Corp., 884 F.2d 726, 733-34 (3d Cir. 1989). (Note that all these courts, in interpreting § 718.204, expressly accept that if the phrase ''substantially contributes'' is the correct interpretation of that regulation's undefined term ''due to,'' it is correct precisely because and as it is used in § 718.205(c).)

Only the Fourth Circuit, in *Robinson* v. *Pickand Mather & Co./Leslie Coal Co.*, 914 F.2d 35, 38 (4th Cir. 1990), has hesitated to find that the qualifying adverb ''substantially'' makes a substantial difference:

> After carefully reviewing all of these cases [just cited], we believe that, despite their use of different words, the standards expressed are practically the same in essence and effect.

Thus, the Fourth Circuit is plainly at odds with the Seventh, Tenth and Eleventh Circuits on an issue directly and immediately related to the present issue. Both the conflict, and the weight of opinion that there is substantial difference between ''substantially contributes'' and ''contributes'' passed unnoticed in *Lukosevicz* and in the court of appeals below, as in the Director's Brief, which treats the two as equivalent.

The conflict just mentioned concerns the question of whether ''substantially contributes'' has a substantially different meaning from ''contributes.'' On that question, the Fourth Circuit stands completely isolated. (The division of opinion among the other circuits as to *which* of those two differing standards is appropriate in applying 20 C.F.R. § 718.204(a) is irrelevant here.) Even the Fourth Circuit wavers: on the same page as that quoted from above, it says:

> We also find that the words ''significant'' or ''substantial,'' while contributing little to the analysis of the causation requirement, could be used to reconstruct an unnecessarily high hurdle for claimants [under 20 C.F.R. § 718.204(a)] to clear.

914 F.2d at 38.

The Petitioner's purpose in citing these cases is not to invite the Court to undertake a consideration of the disputed interpretation of 20 C.F.R. § 718.204. It is to observe that the

great weight of contemporary authority in the circuits confirms the obvious and ordinary meaning of the words ''substantially contributing'' as something quite different from the meaning of ''contributing.'' Among other unacceptable results of accepting the Director's interpretation of § 718.205(c) will be distortion and confusion of the law in other contexts in which the term ''substantially'' is used, or is deliberately not used,— such as the contested meaning of § 718.204.

The misinterpretation from which the Petitioner seeks relief simply reads the word ''substantially'' out of § 718.205(c). It thereby replaces a deliberately heightened and all-things-considered standard with a simplistic, excessively lenient, and even *de minimis* standard.

The agency-created ''substantially contributing'' standard in § 718.205(c) is more demanding than the ''simple contribution'' standard created for disability claims under § 718.204(a) by the Fourth, Sixth, Seventh and Tenth Circuits (in preference to the ''substantial contribution'' standard favored for disabiiity claims by the Third and Eleventh Circuits and, it appears, by the Director). But the Seventh Circuit has pointed out that there is good reason for the standard of causation to be higher in relation to survivors' claims than in relation to disability claims. *Hawkins* v. *Director, OWCP*, 907 F.2d 697, 706 (7th Cir. 1990).

CONCLUSION

The Director should be required to elect between abandoning the novel and untenable interpretation of 20 C.F.R. § 718.205(c) advanced on his behalf in this litigation, or giving it effect by proposing an amendment in a public rulemaking proceeding. Until such time as the regulation is amended, however, the existing regulation should be accorded its proper interpretation, not the distorted interpretation approved by the Fourth Circuit below and by the Third Circuit in *Lukosevicz*.

Respectfully submitted,

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APPENDIX

In the Matter of

JEWELL L. SHUFF, Widow of PAUL SHUFF *Claimants* v. CEDAR COAL COMPANY	DATE ISSUED: AUGUST 10, 1989
Employer and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS *Party-in-Interest*	CASE NO. 87-BLA-2667 OWCP NO. CH 232-40-2491

APPEARANCES:[1]

ANTHONY J. CICCONI, ESQ.
For the Claimant

DAVID YAUSSY, ESQ.

BEFORE: ROBERT L. HILLYARD
Administrative Law Judge

DECISION AND ORDER—AWARDING BENEFITS IN LIVING MINER'S CLAIM AND DENYING BENEFITS IN SURVIVOR'S CLAIM

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act, and the Regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a formal hearing.

Benefits under the Act are awardable to person who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons who were totally disabled at the time of their death or whose death was

1. The Director, Office of Workers' Compensation Programs, was not represented by counsel at the hearing.

caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and its commonly known as black lung.

A formal hearing in this case was held in Huntington, West Virginia, on August 29, 1988. Each of the parties was afforded full opportunity to present evidence and argument at the hearing as provided in the Act and the regulations issued thereunder which are found in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that title.

The findings and conclusions which follow are based upon my observation of the appearance the demeanor of the witnesses who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

I. STATMENT OF THE CASE

Mr. Shuff filed his claim for black lung benefits with the Department of Labor on May 24, 1983 (DX 1).[1] The Department of Labor notified Cedar Coal Company of the claim on June 13, 1983 (DX 19), and Cedar Coal filed a controversion on July 14, 1983 (DX 20). Mr. Shuff died on July 28, 1983 (DX 14), and Mrs. Shuff filed her claim for survivor's benefits on August 18, 1983 (DX 2). The Office of Worker's Compensation Programs, United States Department of Labor, made an initial finding of entitlement in the Living Miner's claim on September 1, 1983 (DX 21). Cedar Cola filed a controversion on September 28, 1983 (DX 22). After further development of the evidence, the Office of Workers' Compensation denied both the Living Miner's and the Survivor's claims, on March 5, 1987 (DX 28, 29). A formal hearing was requested on March 25, 1987 (DX 30), and Cedar

2. At the hearing, the record was left open in order to receive the depositions of Drs. Walker and Rasmussen (Tr. 19-21). Those depositions were submitted in a timely fashion and are hereby received as Employer's Exhibits 12 and 13, respectively.

Coal was notified of the denials and the appeal on March 30, 1987 (DX 34, 35). Cedar Coal filed a controversion on April 20, 1987 (DX 36), and the claim was referred to the Office of Administrative Law Judges on June 4, 1987 (DX 37).

II. ISSUES

The specific issues presented for resolution are:

1. Whether the miner had pneumoconiosis as defined by the Act and the regulations;
2. Whether the miner's pneumoconiosis arose out of coal mine employment;
3. Whether the miner was totally disabled; and
4. Whether the miner's disability or death was due to pneumoconiosis (DX 37; Tr. 12).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

The person upon whose employment this claim is based, Paul Shuff, was born on July 18, 1930, and died on July 28, 1983 (DX 1). He had an eighth grade education (DX 1). Mrs. Shuff contended that her husband worked for 17 years in coal mine employment (Tr. 18). She indicated that he worked for Cedar Coal Company, Union Carbide Mine, and several coal mine employers (Tr. 15), starting coal mining at age 16 (Tr. 18). Mrs. Shuff testified that her husband would come home from the mines very dirty and tired, and that for most of his coal mine employment he worked as a roof bolter (Tr. 15). Mr. Shuff continued to work until a few months prior to his death (Tr. 16). He was treated by Dr. Lee (Tr. 15).

Mrs. Shuff testified that Mr. Shuff smoked cigarettes from the time he was a boy, was smoking at the time she first met him 1959, and that his smoking varied (at times he would quit, at other times he smoked as much as two packs per day,

and he smoked only about 1/2 pack per day shortly prior to his death), but he averaged about one pack per day (Tr. 15-17).

B. Length of Coal Mine Employment

Mr. Shuff was a coal miner within the meaning of § 402(d) of the Act and 20 C.F.R. § 725.202 of the regulations. Length of coal mine employment is not formally marked as an issue in this case on Form CM-1025 (DX 37). At the hearing counsel for the Employer stated that he was willing to stipulate to at least 10 years of coal mine employment; however, counsel for the Claimant maintained that the record establishes 17 years (Tr. 18-19).

The record contains a statement under the letterhead of Armco Steel Corporation in which it is indicated that Mr. Shuff was employed by that company from January 3, 1949 to January 20, 1949 as a conveyor loader (DX 5). A statement under the letterhead of Eastern Associated Coal Corporation indicates that Mr. Shuff was employed by that company from April 19, 1951 to September 4, 1952 to conveyor loader, and from September 20, 1955 to May 31, 1957 as a timberman (DX 6). A statement under the letterhead of King Powellton Mining, Inc., states that Mr. Shuff worked for that company from August 1, 1972 to May 14, 1973 (DX 7). A statement under the letterman of The Valley Camp Coal Company indicates that Mr. Shuff worked for that company from July 19, 1973 to August 10, 1973 (DX 8). A statement under the letterhead of Union Carbide Corporation reports that Mr. Shuff worked for that company from December 22, 1969 to June 11, 1971, from September 13, 1971 to September 27, 1971, and from August 15, 1973 to October 20, 1973 (DX 9). A statement under the letterhead of Cedar Coal Company reports that Mr. Shuff worked for that company from September 30, 1971 to July 21, 1972, from January 26, 1973 to March 23, 1973, and from October 25, 1973 to present (September 5, 1975) (DX 10). A statement under the letterhead of Southern

Appalachian Coal Company states that Mr. Shuff worked for that company from May 14, 1973 to June 19, 1973 (DX 11).

Cary Shuff's birth certificate dated July 19, 1968 shows her father's occupation as ''miner'' (DX 13).

The documentary evidence from Mr. Shuff's various employers shows approximately nine years of coal mine employment through September 1975. In addition, the uncontradicted testimony of Mrs. Shuff in this case is that her husband continued to work up until a few months prior to his death in 1983 (Tr. 16). Mr. Shuff stated that he was still working for Cedar Coal Company when he completed a Department of Labor Form CM-911a in May 1983 (DX 3). Based upon this record, I find that Mr. Shuff worked for at least 16 years in coal mine employment.

C. Responsible operator

It is not contested that Cedar Coal Company was Claimant's most recent employer for a cumulative period of at least one year after December 31, 1969, and is the properly named responsible operator under § 725.493.

D. Dependents

Mrs. Shuff and Cary Shuff were dependents of Mr. Shuff for purposes of augmentation of any benefits awarded under the Act and regulations under the Living Miner claim. Cary is a dependent of Mrs. Shuff for purposes of augmentation of the Survivor's Claim for that period during which she qualified under §§ 725.218-725.221. It is noted that Cary was born on July 16, 1968, graduated from high school in June 1986, was married on December 17, 1987, and does not appear to have continued her education past high school (DX 12, 13; Tr. 13-14).

E. State Workers' Compensation Award

Section 725.533(a)(l) provides for a reduction of the amount of benefits payable when compensation is received under a state workers' compensation law because of partial or total

disability due to pneumoconiosis. Mr. Shuff was awarded state workers' compensation benefits for occupational pneumoconiosis on July 25, 1979 (DX 4). Thus, the state workers' compensation benefits offset any award under the federal Black Lung Act. Mrs. Shuff's state claim for survivor's benefits was rejected on August 1, 1986 (DX 6).

IV. MEDICAL EVIDENCE

A. X-ray Studies

	Date	Exhibit	Doctor	Reading	Standards
1.	5-12-83	DX 27	Tanguilig	Normal	Not noted
2.	5-6-83	DX 26	Goodwin	Lungs clear	Not noted
3.	4-26-83	DX 26 (tomogram)	Briley	No mention of pneumoconiosis	Not noted
4.	4-18-83	DX 26	Gogineni	No active infiltrate; scattered calcified granuloma	Not noted
5.	6-10-82	DX 4	OP Board	Occupational pneumoconiosis	Not noted
6.	6-9-82	DX 27	Smith	No evidence of occupational pneumoconiosis	Not noted
7.	9-11-81	DX 26	Smith	0/0	Not noted
8.	8-14-81	DX 26	Briley	No evidence of occupational pneumoconiosis	Not noted
9.	7-24-70	DX 4	OP Board	Occupational pneumoconiosis	Not noted
10.	8-16-76	DX 18; CX 15	Ellswood	1/0 p	Not noted
11.	1-13-75	DX 17; CX 16	Ellswood	1/0 p	Not noted

B. Pulmonary Function Studies

	Date	Exhibit	Doctor	Age	Height	FEV1	FVC	MVV	FEV/FVC[1]	Standards
1.	4-26-83	CX 14	Zaldivar	52	69"	1.58	—	53		Cooperation and comprehension not noted; no tracings
	Interpretation: Severe obstructive airway impairment.									
2.	6-10-82	CX 7		52	67.5"	1.17	—	44		Cooperation and comprehension not noted; four tracings
3.	10-18-79	CX 10	Walker	49	67.5"	1.34	—	46		"B" result* no tracings
4.	7-24-79	CX 9	?	49	67.5"	1.39	—	52		"B" result*
	Interpretation: Found by Dr. Ralph J. Jones to be consistent with a far-advanced degree of pulmonary disability (CX 19; Tr. 8-9).									
5.	1-13-75	DX 16; CX 13	Pushkin	44	174cm	1.67	3.62	58		Cooperation and comprehension not noted; 3 tracings
	Interpretation: Severe obstructive ventilatory impairment.									

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* "B" result indicates that technician felt he or she could not tell if claimant was exerting maximum effort (EX 12, dep. p. 29).

C. Narrative Medical Evidence

1. On July 1, 1985, the West Virginia Occupational Pneumoconiosis Board issued a "Fatal Claim" opinion in which it indicated that it had reviewed its prior examinations in 1979 and 1982, Mr. Shuff's death certificate, an autopsy report, and a discharge summary from CAMC dated May 23, 1983. The Board, which is comprised of several physicians, concluded Mr. Shuff's death was not due to occupational pneumoconiosis, and that occupational pneumoconiosis was not a major contributing factor in his death (EX 7).

2. In a letter dated October 20, 1987, Dr. James H. Walker, one of the members of the West Virginia Occupational Pneumoconiosis Board, indicated that he reviewed some medical reports and the Board's prior determinations. He opined that "Mr. Shuff's pulmonary impairment was significantly related to and aggravated by coal dust exposure and thus under the Federal Act it would be a substantially contributive cause leading to his death" (CX 5).

Dr. Walker was deposed on September 8, 1988 concerning his evaluation of Mr. Shuff (EX 12). He is board-certified in thoracic and cardiovascular surgery (dep. p. 3). He states that Mr. Shuff's severe level of obstruction as evidence by pulmonary function studies was an indicator of his pneumoconiosis and his chronic obstructive pulmonary disease (dep. p. 4-5, 260). He said that Mr. Shuff's emphysema could be part of the pneumoconiosis, though no one could differentiate between the effect of smoking and the effects of irritating dust or fumes (dep. p. 7-9, 34-35). Dr. Walker reviewed the autopsy reports of Drs. Shim, Rodman, Hansbarger, and Cinco, noting that several of the reviewing pathologists had very few slides to study, and that Dr. Shim was in the best position to make an evaluation. He agreed that the autopsy evidence showed a mild degree of pneumoconiosis (dep. p. 12), however, he felt that some of the pathologists had erroneously ignored associated emphysema (dep. pp. 12-13). Dr. Walker agreed that the extent of Mr. Shuff's cancer was that he was going to die as a result (dep. p. 14). Dr. Walker stated that he was not entirely familiar with the federal legal

requirements for showing death due to pneumoconiosis (dep. p. 15-18). He said, however, that Mr. Shuff's death was not due to occupational pneumoconiosis and it was not a major contributing factor in his death (dep. p. 16). The pneumoconiosis still had a substantial relationship between Mr. Shuff's death and his pneumoconiosis because Mr. Shuff "would have died because of his carcinoma of the pancreas, whether he had pneumoconiosis or not, and he probably died sooner because of his pneumoconiosis because of the development of the pneumonia" (dep. p. 21-23, 26). Cigarette smoking might also have caused pneumonia (dep. p. 40). Pneumonia was the immediate cause of death (dep. p. 26). Dr. Walker indicated that when operating under the state system, the Board often operates under legal presumptions (dep. p. 37-39).

3. The record contains an autopsy report by Dr. Chull Shim dated July 29, 1983. Dr. Shim's final diagnosis was: (1) adenocarcinoma of pancreas with metastases to heart, lungs, subcutaneous tissue of the right preauricular region, neck and posterior thorax, ribs and abdominal viscerae, (2) simple coal workers' pneumoconiosis, (3) bronchopneumonia involving left lower lobe, and (4) relux esophagitis (DX 15). In an affidavit dated October 10, 1983, Dr. Shim, who is a board-certified pathologist, stated that:

> 5. The coal workers' pneumoconiosis which was present in the lungs was minute in size and density. In may professional opinion, the coal workers' pneumoconiosis which was found was not the cause of death of Mr. Paul Shuff.
>
> 6. The cause of Mr. Paul Shuff's death was adenocarcinoma of the pancreas with metases to the heart, lungs, subcutaneous tissue of the right preauricular region, neck and posterior thorax, ribs and abdominal viscerae.
>
> 7. Although simple coal workers' pneumoconiosis was present it was of such a mild nature and degree that, in my professional opinion, the cause of death was significantly related to or aggravated by pneumoconiosis.

> 8. Even if Mr. Paul Shuff had not had simple coal workers' pneumoconiosis, he would have died due to the adenocarcinoma of the pancreas which had metatastsized.

(DX 25).

4. On June 24, 1985, Dr. Nathaniel F. Rodman, a board-certified pathologist, performed an "autopsy consultation report." In a detailed report, Dr. Rodman reviewed various medical reports including outpatient records, occupational pneumoconiosis board reports, the original autopsy report of Dr. Shim, and performed a review of slides. Dr. Rodman's conclusion was:

> It is concluded that the immediate cause of death in the case of Mr. Paul Shuff was his widely metastatic and anaplastic adenocarcinoma arising in the pancreas. It is concluded that Mr. Shuff had minimal coal workers pneumoconiosis. Further, it is concluded that Mr. Shuff's minimal coal workers pneumoconiosis produced no physical or medical impairment during his lifetime and played no direct or contributory role in Mr. Shuff's death (EX 8, 9).

5. In a report dated May 31, 1985, Dr. Robert J. Crisalli, who is board-certified in internal medicine, performed a review of the medical record (EX 11). Dr. Crisalli concluded:

> ... Mr. Shuff's death was caused by adeno-carcinoma of the pancreas with widespread metastasis to numerous critical organs including the heart and lungs. Though Mr. Shuff did not have severe obstructive pulmonary disease by clinical examination and testing and occupational pneumoconiosis by pathology, the occupational pneumoconiosis did not contribute to this patient's demise. Coal workers' pneumoconiosis was not the cause of death in this case, it did not contribute to this patient's death, and Mr. Shuff would have expired from his pancreatic carcinoma and its' diffuse metastasis even if he had perfectly normal lungs to begin with. The cause of death was not related to or aggravated by the pneumoconiosis nor was this patient's death hastened by the presence of his

pneumoconiosis (EX 10).

6. In a report dated June 10, 1988, Dr. Echols A. Hansbarger, Jr., performed a review of the medical record, including a copy of the autopsy protocol and 16 autopsy slides. Dr. Hansbarger performed an independent review of the autopsy. Dr. Hansbarger found that Mr. Shuff died as a result of adenocarcinoma of the pancreas with widespread systemic metastatic disease and acute bronchopneumonia; Mr. Shuff suffered from antracotic pigmentation of the lung of an insufficient degree to warrant the diagnosis of coal workers' pneumoconiosis or any other occupational pneumoconiosis of the lung; since Mr. Shuff did not suffer from pneumoconiosis it could not have had an impact on his demise; Dr. Hansbarger disagreed with Dr. Shim's diagnosis of coal workers' pneumoconiosis; Dr. Hansbarger disagreed with the conclusion of Dr. Alberto C. Lee that coal workers' pneumoconiosis was a major contributing factor to the death of Mr. Shuff (EX 1). Dr. Hansbarger is a board-certified pathologist (EX 2).

7. Dr. George L. Zaldivar wrote a consultation report on June 17, 1988. Based upon a review of the record, Dr. Zaldivar concluded that Mr. Shuff died from metastatic carcinoma of the pancreas; that "since the presence of macules is questionable it is not reasonable to conclude that an overwhelming amount of dust in the lungs was causing pulmonary dysfunction;" Mr. Shuff had longstanding emphysema caused by his lifelong history of smoking; the dust burden in the lungs was not significant enough to cause the emphysema which was caused by smoking. Dr. Zaldivar continued, stating that Mr. Shuff was severely impaired from the pulmonary standpoint prior to death, although the death itself was caused by carcinoma of the pancreas, which was unrelated to coal mine work (EX 3). Dr. Zaldivar is a B-reader, and is board-certified in Internal Medicine and Pulmonary Diseases (EX 4).

Earlier, on March 8, 1985, Dr. Zaldivar had performed a

review of the medical record. He concluded that—

—Mr. Shuff had a severe obstructive airway impairment;

—Mr. Shuff's mine duties must have been very light for him to have been able to maintain his employment up to near to the time of death;

—The cause of death was not respiratory failure due to coal workers' pneumoconiosis or emphysema;

—Pneumonia was a terminal event (cancer kills by way of malnutrition and infection, with infection usually a pneumonia);

—He fully agreed with Dr. Shim's assessment of the case;

—The cause of death was cancer which was spread to all organs of the body;

—Even if Mr. Shuff had normal lungs the cancer would have resulted in his death.

Dr. Zaldivar Concluded that:

> . . . Mr. Shuff has had documented severe airway obstruction. This airway obstruction was due to emphysema caused by cigarette smoking and coal workers' pneumoconiosis. However, the severe airway obstruction caused by whichever factor was not the cause of death. The cause of death was cancer as I have explained in my review of these records and as Dr. Shim explained at the time of the autopsy (CX 17).

8. On August 4, 1988, Dr. Angel M. Cinco performed a review of available medical records including autopsy sides on Mr. Shuff. Dr. Cinco found, inter alia, diffuse, moderately severe centrolobular emphysema and coal workers' pneumoconiosis of dust reticulation type. Dr. Cinco concluded that "both chronic obstructive lung disease and the coal workers' pneumoconiosis were contributory factors to [Mr. Shuff's] death. The major cause of death, however, was due to the widespread metastic andenocarcinoma from the pancreas." (CX 1). Dr. Cinco is a board-certified pathologist (CX 2).

9. On July 28, 1988, Dr. D. L. Rasmussen issued a report

in which he reviewed the medical record. Dr. Rasmussen concluded: Mr. Shuff had severe totally disabling respiratory insufficiency; is pulmonary impairment could be attributed to both coal mine dust exposure and cigarette smoking and there is no clear way to distinguish the two etiologic factors; while Mr. Shuff's death would have ensued regardless of the status of the lungs, his demise "may have been hastened by virtue of his underlying chronic lung disease making survival of metastatic lesions as well as his bronchopneumonia (which could have been secondary to his debilitated state secondary to the adenocarcinoma) impossible to survive." Dr. Rasmussen summarized:

> . . . it is my opinion that this patient had coal workers' pneumoconiosis which arose from his coal mine employment and which was a major factor in his disabling respiratory insufficiency and contributed to his death by reducing his chances of surviving his metastatic cancer (CX 3).

Dr. Rasmussen is board-certified in Internal Medicine and Pulmonary Diseases (EX 4).

Dr. Rasmussen was deposed concerning his evaluation of Mr. Shuff on September 22, 1988 (EX 13). He essentially reiterated the findings stated in his report, albeit in more detail. In addition, Dr. Rasmussen said that Mr. Shuff's smoking history could have caused his obstructive impairment, and even possibly his cancer (dep. p. 9-10). There is no evidence to suggest that coal mine dust exposure caused Mr. Shuff's pancraetic cancer according to Dr. Rasmussen (dep. p. 10). Mr. Shuff's pulmonary impairment could be attributable to both coal mine exposure and cigarette smoking (dep. p. 10). Dr. Rasmussen also criticized the reports of the pathologists who only examined seven slides, noting too that they did not really offer any explanation for Mr. Shuff's severe obstructive lung disease, and noting that the state of scientific knowledge was not such that pathological findings could be used to identify whether

pneumoconiosis was causing a certain amount of functional impairment (dep. p. 12-13). Dr. Rasmussen also indicated that Mr. Shuff had a totally disabling respiratory impairment which was significantly related to coal mine dust exposure (dep. p. 21-22, 25), and that the totally disabling pulmonary impairment was a substantially contributing cause or factor leading to Mr. Shuff's death (dep. p. 25). Dr. Rasmussen indicated that Mr. Shuff would have been considered to have been totally disabled as early as 1975 (dep. p. 27).

10. Dr. Albert Lee was deposed concerning his treatment of Mr. Shuff on July 28, 1988 (EX 5). Dr. Lee is board eligible in Internal Medicine. He was Mr. Shuff's treating physician for about eight year (dep. p. 3). He reported that Mr. Shuff's 35 pack year history of cigarette smoking was significant (dep. p. 4). He indicated the the miner's chronic obstructive pulmonary disease was caused by both cigarette smoking and his coal dust exposure (dep. p. 5, 13), and although statistically speaking, smoking was the more likely cause (dep. p. 5), coal mine work could aggravate chronic obstructive disease and that it was difficult to distinguish how much of it was caused by cigarettes as opposed to coal dust exposure (dep. p. 13, 23). He further stated that during the time he treated Mr. Shuff, Mr. Shuff had essentially the same degree of chronic obstruction (dep. p. 9). Dr. Lee agreed with a diagnosis of severe obstructive disease (dep. pp. 13-14), had advised Mr. Shuff to stop working because of his pulmonary status, and questioned how he was able to work because he clinically exhibited shortness of breath, but Mr. Shuff refused to quit (dep. p. 16). Dr. Lee said that the pulmonary impairment was significantly related to or aggravated by Mr. Shuff's coal mine dust exposure (dep. p. 16), although he had no objective data to confirm this conclusion (dep. p. 20). Dr. Lee also agreed that Mr. Shuff qualified for a diagnosis of industrial bronchitis (dep. p. 17), which could be related to smoking (dep. p. 23-24) or, according to Dr. Lee's clinical impression, Mr. Shuff's coal mine dust exposure (dep. p. 27).

Continuing in his deposition, in June 1983, Dr. Lee diagnosed pancreatic cancer, which was invariably fatal (dep. p. 9, 11). Dr. Lee stated that Mr. Shuff died primarily from pancreatic cancer that had metastasized throughout his body (dep. p. 9-10). Pneumoconiosis did not cause the cancer or affect the spread of the disease (dep. p. 9-10). Dr. Lee said that the death certificate he completed included coal workers' pneumoconiosis only as an ancillary finding—there was significant impairment present, but it did not affect the progress of the cancer which caused death (dep. p. 10). The pneumoconiosis contributed to death in an indirect way, but not in a significant manner (dep. pp. 10-11). It was not a major contributing cause to his death (dep. 11, 12-23). Further, Dr. Lee agreed that the terminal or immediate cause of death was bronchial pneumonia (dep. p. 14, 20, 28), and said that pneumoconiosis, or the obstructive lung disease, would have made Mr. Shuff more susceptible to pneumonia, and in that respect was a major contributing cause of death (dep. 15, 27-29); however, Dr. Lee was unwilling to state whether the pneumoconiosis, as a contributing cause of death, was mild, moderately or severely significant (dep. p. 29-30). Mr. Shuff's pneumonia was also contributed to by the cancer (dep. p. 29). Dr. Lee agreed with Dr. Shim's autopsy report (dep. p. 24).

Dr. Lee, on July 31, 1984, authored a letter regarding his care of Mr. Shuff from January 13, 1975, until his death on July 28, 1983. Review x-ray, pulmonary function tests, and Mr. Shuff's autopsy report, Dr. Lee wrote:

> . . . although Mr. Shuff died of Metastatic Adenocarcinoma his pulmonary function tests were markedly abnormal prior to the onset of his adenocarcinoma. His pulmonary impairment as a result of Coal Workers' Pneumoconiosis was a major contributing factor in his demise (CX 12).

11. The record contains the miner's death certificate which shows the date of death as July 28, 1983. The immediate

cause of death is listed as carcinoma of the pancreas with metastasis. Other significant conditions contributing to death is coal workers' pneumoconiosis (DX 14). The death certificate was signed by Dr. Lee.

12. Dr. J. Teleron examined Mr. Shuff on admission to the hospital from June 30, 1983 to July 12, 1983, at which time he reviewed Mr. Shuff's symptoms and his family history, and performed a physical examination, and EKG. He diagnosed pancreatic carcinoma, metastatic to the lungs and cervical nodes, intractable pain of the right hip, on high dose of morphine (DX 27).

13. On June 10, 1982, the West Virginia Occupational Pneumoconiosis Board issued an opinion in which they reported that they had reviewed the record before the Board including a medical report by Dr. Pushkin dated 1-13-75, appearances by Drs. MacCallum and Smith, three previous chest x-rays, and a previous evaluation by the Board in 1979, and obtained a work history of 22 years of coal mine employment with Mr. Shuff still being employed, a history of symptoms, a physical examination by members of the board, a pulmonary function study, and chest x-ray. The Board, which is made up of physicians, concluded that the miner had a 60% pulmonary functional impairment. They found that the miner was suffering from pneumoconiosis (DX 4; CX 6).

14. Drs. Daniel B. MacCallum and James T. Smith examined Mr. Shuff on June 9, 1982, at which time they reviewed Mr. Shuff's symptoms and his occupational (22 years, all inside the mine), medical (back injury), smoking (1/2 pack per day for past 5 years; prior to this, 1 pack, per day for 30 years) histories and performed a physical examination, an exercise tolerance test, and a chest x-ray. In their opinion, Mr. Shuff had no evidence of occupational pneumoconiosis (DX 27).

15. Dr. Alberto C. Lee completed a form dated October 13, 1981, and entitled "Physician's Report of Occupational Pneumoconiosis." Dr. Lee noted that he first

treated Mr. Shuff in 1975, that he had pneumoconiosis p 1/0 and has suffered from that disease for 6 or 7 years, that he had a moderate impairment in the capacity for work as the result of occupational pneumoconiosis. Dr. Lee also reported on a medical history (back injury 1978), symptoms, previous chest x-rays (1-13-75 and 8-16-76—pneumoconiosis p 1/0), a pulmonary function study (1-13-75), and a physical examination (DX 16).

16. On July 24, 1979, the West Virginia Occupational Pneumoconiosis Board issued an opinion in which they reported that they had reviewed the record before the Board including appearances by Drs. Jones and Hayes, a work history of 20 years of coal mine employment with Mr. Shuff still being employed, a history of symptoms, a physical examination by members of the Board, a pulmonary function study, and a chest x-ray. The Board concluded that the miner had a 50% pulmonary functional impairment. The indicated that the miner was suffering from occupational pneumoconiosis (DX 4; CX 8).

17. Dr. Lee appears to have at least partially filled out an "Employee's Report of Occupational Pneumoconiosis" on January 27, 1985. He recorded Mr. Shuff's history of shortness of breath for one year, Mr. Shuff's positive chest x-ray (p 1/0), that he had administered a pulmonary function study, and the results of a physical examination (DX 16).

V. DISCUSSION AND APPLICABLE LAW

Since the Living Miner's claim was filed after March 31, 1980, it must be adjudicated under the regulations at 20 C.F.R. Part 718. To show entitlement to benefits, it must be established that the miner had pneumoconiosis, that his pneumoconiosis arose of his coal mine employment, and that he was totally disabled as a result.

Section 718.202(a) provides four means by which pneumoconiosis may be established. Under § 718.202(a)(1), a finding of pneumoconiosis may be made on the basis of x-ray

evidence. In the instant record, x-ray interpretations were made of 11 x-rays. The two earliest films, taken in 1975 and 1976, respectively, were both interpreted as positive for pneumoconiosis. In addition, it was reported in the opinions of the West Virginia Occupational Pneumoconiosis Board that a member of the Board had made positive interpretations of July 1979 and June 1982 films. These latter interpretations were not given a numerical classification according to an approved classification system. In contrast, the remaining 7 interpretations were all negative for pneumoconiosis. All of those films were taken after July 1981. Hence, considering the number of negative as opposed to positive interpretations, and the sequence of the films, it is concluded that the weight of the x-ray evidence fails to establish the existence of pneumoconiosis pursuant to § 718.202(a)(l).

Under section 718.202(a)(2), a determination that pneumoconiosis is present may be based on biopsy or autopsy evidence. A report of autopsy is to be accepted unless there is evidence that the report is not accurate or that the claim has been fraudulently represented.

Dr. Shim performed an autopsy on Mr. Shuff and found simple coal workers' pneumoconiosis. Dr. Rodman performed an autopsy consultation and found minimal coal workers' pneumoconiosis. Dr. Cinco reviewed autopsy slides and found coal workers' pneumoconiosis. On the other hand, Dr. Hansbarger found anthracotic pigmentation of an amount insufficient to warrant a diagnosis of pneumoconiosis.

Dr. Walker in his deposition indicated that Dr. Shim had been in the best position to diagnose pneumoconiosis given the small amount of autopsy slides examined by the viewing pathologists. Dr. Rasmussen was of much the same opinion. Dr. Crisalli said that pneumoconiosis was shown by pathology. Drs. Zaldivar and Lee agreed with Dr. Shim's assessment of the case, and hence, implicitly, with his finding of coal workers' pneumoconiosis.

Hence, of the physicians who reviewed the autopsy evidence, only Dr. Hansbarger did not find at least minimal pneumoconiosis. It must be concluded that Dr. Shim was indeed in the best position to evaluate the autopsy evidence given that he performed the actual autopsy procedure, and that his opinion appears to be credible given the general support for his opinions in the other narrative medical reports with the exception of Dr. Hansbarger's report. Based on this record, it is concluded that the presence of pneumoconiosis has been established pursuant to § 718.202(a)(2).

Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of the several presumptions are found to be applicable. In the matter at hand, § 718.304 does not apply because there exists neither x-ray, biopsy, autopsy, or other evidence of large opacities or massive lesions in the lungs. Section 718.305 is not applicable to claims filed after January 1, 1982. Section 718.306 is not applicable since Mr. Shuff died after March 1, 1978.

Under § 728.202(a)(4) a determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in §718.201. Pneumoconiosis is defined in § 718.201 as a chronic dust disease of lung, including respiratory or pulmonary impairments, arising out of coal mine employment.

Drs. Walker, Shim, Rodman, Crisalli, Cinco, Rasmussen, and Lee found pneumoconiosis. In contrast, Drs. Hansbarger concluded that the diagnosis of pneumoconiosis was not warranted. Dr. Zaldivar indicated that he was in full agreement with the opinion of Dr. Shim, and thus, implicitly, with the conclusion that Mr. Shuff suffered from at least minimal pneumoconiosis. Dr. Zaldivar in his 1985 report said that Mr. Shuff had emphysema caused by both smoking and by coal mine dust exposure. In his 1988 report Dr. Zaldivar said that the emphysema was caused by smoking.

Drs. MacCallum and Smith found no evidence of occupational pneumoconiosis. For what it is worth, it is noted that the West Virginia Occupational Pneumoconiosis Board found that Mr. Shuff was suffering from occupational pneumoconiosis. It is noted, however, that Dr. Walker said that the Board's determinations are often aided by legal presumptions; hence, the Board's finding of pneumoconiosis is limited in probative value because there appears to be differences between the law applied in state and federal black lung claims, and because the Board's decision does not appear to be a purely medical one. Given the number of physicians who found pneumoconiosis and the fact that those opinions appear to be supported by the weight of the autopsy evidence, it is concluded that the weight of the narrative medical evidence establishes that Mr. Shuff had pneumoconiosis.

It must also be established that Mr. Shuff was totally disabled by his pneumoconiosis. The standards for determining whether a miner is or was totally disabled are contained in, § 718.204. A miner is considered totally disabled if the irrebuttable presumption of § 718.304 applies. The irrebuttable presumption of § 718.304 is invoked where large opacities classified in category A, B, C are diagnosed by chest x-ray. § 718.304(a). However, none of the x-rays of record reflect the existence of large opacities.

Where the irrebuttable presumption of §718.304 does not apply, a miner shall be considered disabled if pneumoconiosis as defined in §718.201 prevents or prevented the miner:

> 1. From performing his or her usual coal mine work; and
> 2. From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.

Section 718.204(b)(l) and (2).

Section 718.204(c) sets forth the criteria for establishing the miner's total disability. It is provided that in the absence of any contrary probative evidence, which meets the standards of § 718.204(c) shall establish a miner's total disability. Section 718.204(c) requires the weighing of all of the relevant probative evidence, both like and unlike evidence, with the burden of proof always on the claimant to establish total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

Under § 718.204(c)(1), total disability may be established by pulmonary function study evidence meeting the criteria set out therein and in Appendix B to Par 718. In this case, each of the pulmonary function studies yielded values which qualify under the Part 718 criteria. Effort and cooperation was not noted on several of the studies or found to be questionable on others. However, given the uniformity of the results and the lack of criticism of the studies, it is concluded that the studies are generally credible and support a finding of total disability under § 718.204(c)(1).

The record does not contain any blood gas study evidence. Hence, total disability is not established pursuant to § 718.204(c)(2).

None of the medical evidence in the record suggests that Mr. Shuff suffered from cor pulmonale with right-sided congestive heart failure. Thus, total disability is not established as set forth in § 718.204(c)(3).

Pursuant to § 718.204(c)(4), total disability may be established if a physician exercising reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in his usual coal mine work or gainful and comparable employment as described in § 718.204(b). The narrative medical reports were detailed above. In brief—

—the West Virginia Occupational Pneumoconiosis Board found that Mr. Shuff had a 50% pulmonary functional

impairment in July 1979 and a 60% pulmonary functional impairment in June 1982. Pneumoconiosis was not a major contributing cause of death. Since the Board's determination is based on both medical and legal factors, it has limited probative value.

— Dr. Walker, a member of the Board, said that Mr. Shuff had a severe obstructive disease which was related to pneumoconiosis and chronic obstructive pulmonary disease. He said that pneumoconiosis was not a major contributing factor in Mr. Shuff's death although it had a substantial relationship.

— Dr. Shim said that pneumoconiosis was not significantly related to the miner's death. He did not comment on whether pneumoconiosis was totally disabling.

— Dr. Rodman said that Mr. Shuff's minimal coal workers' pneumoconiosis produced no physical or medical impairment and played no direct or contributory role in death.

— Dr. Crisalli said that Mr. Shuff had a severe obstructive pulmonary disease. He said that pneumoconiosis did not contribute to the miner's death and did not hasten death. He did not directly comment on whether pneumoconiosis played a role in the severe obstructive pulmonary disease.

— Dr. Hansbarger found no pneumoconiosis and indicated that since there was no pneumoconiosis it did not impact on Mr. Shuff's demise. He did not comment on whether pneumoconiosis was causing disability during life.

— Dr. Zaldivar, in his 1988 report, found that Mr. Shuff was severly impaired from a pulmonary standpoint, but that dust in the miner's lungs was not causing pulmonary dysfunction and was not sufficient to cause emphysema. He said that the miner's death was not related to coal mine employment. In his 1985 report, however, he said that the miner's severe airway impairment was caused by emphysema which was related to both smoking and to coal mine employment. Dr. Zaldivar did not explain why his reasoning about the cause the miner's emphysema had changed. Because this change in

opinion is not explained and because there are other medical opinions in the record that show a relationship between the miner's emphysema and his coal mine work, Dr. Zaldivar's opinion will be given less probative value in regard to the etiology of the emphysema.

—Dr. Cinco found that both chronic obstructive lung disease and coal workers' pneumoconiosis were contributing factors in Mr. Shuff's death, however, they were not the major cause. He did not comment on whether those conditions contributed to disability during the miner's lifetime.

—Dr. Rasmussen found severe totally disabling respiratory insufficiency related to both coal dust exposure and cigarette smoking. He said that coal workers' pneumoconiosis was a major factor in the disabling respiratory insufficiency, and that it was a substantially contributing cause of death.

—Dr. Lee, Mr. Shuff's treating physician, in 1988, found severe obstructive disease and said that it was significantly related to or aggravated by coal mine dust exposure. He said that he advised Mr. Shuff to quit work and didn't know how he was able to continue. Pneumoconiosis was not a major contributing cause of death. In 1981, Dr. Lee found that Mr. Shuff had a moderate impairment of capacity for work as a result of pneumoconiosis.

—Dr. Teleron, in the hospital records of June 1983, did not address respiratory disability during lifetime.

—Drs. MacCallum and Smith found no evidence of occupational pneumoconiosis, but did not address the question of disability.

It is Claimant's burden to establish total disability due to pneumoconiosis. *Roberts v. Bethelehem Mines Corp.*, 8 BLR 1-211 (1985). In this case, the weight of the evidence shows that Mr. Shuff suffered from a severe respiratory impairment during his lifetime. The evidence shows that he continued to work regardless of this medical assessment up until a few months prior to his death. Unfortunately, the record does not contain information regarding whether Mr. Shuff was given

lighter work loads or whether he continued to work because of financial necessity. The record does show that he worked until April 19, 1983 and that he worked as a general laborer on the belts from 1980 to 1983 (DX 1). Nevertheless, based on the record presented, it is concluded that Mr. Shuff had a physiological respiratory impairment that was sufficient to be considered totally disabling on a medical basis at some point prior to his death. According to Dr. Rasmussen, Mr. Shuff was disabled possibly even as early as 1975. However, there are also indications that the condition may not have worsened to total disability until near the time of death given that the West Virginia Occupational Pneumoconiosis only found a 50% disability in 1979 and a 60% disability in 1982. Dr. Lee, the treating physician, found only a moderate impairment in 1981. Given Mr. Shuff's continued work, it is concluded that he did not become totally disabling until the date he actually discontinued work.

Attention is next directed to the question of whether Mr. Shuff's respiratory impairment was related to pneumoconiosis. Drs. Walker, Rasmussen and Lee all found that coal mine work at least played a partial role in the miner's disabling respiratory condition. Dr. Zaldivar's opinion on etiology is inconsistent and, as a result, is given less weight. Dr. Rodman said that there was no relationship between dust exposure and disability; however, given that three other physicians, including the miner's treating physician, found such a relationship, it is concluded that the existence of total disability due to pneumoconiosis has been established pursuant to § 718.204(c)(4). It is noted that the evidence regarding Mr. Shuff's death does not tend to show that he was totally disabled due to pneumoconiosis during his lifetime, although neither does it tend to show that he was not so disabled.

When the pulmonary function study evidence, the narrative medical reports, and the hearing testimony, and other relevant evidence, are considered all in concert, the case for total

disability due to pneumoconiosis is only strengthened. The pulmonary function study evidence shows a severe respiratory impairment, the weight of the narrative medical evidence show that the miner was severely impaired by a respiratory condition at least partially related to coal mine dust exposure, the lay testimony shows that the miner was disabled, and the record shows that Mr. Shuff worked as an underground coal miner for at least 16 years. Hence, it is concluded that total disability due to pneumoconiosis has been established pursuant to § 718.204(c).

Since Mr. Shuff worked for more than 10 years in coal mine employment, there is a rebuttable presumption that his pneumoconiosis arose out of coal mine employment pursuant to § 718.302. The only evidence that might be construed as tending to show that the miner's pneumoconiosis did not arise out of coal mine employment is Dr. Hansbarger's autopsy report and medical review; however, Dr. Hansbarger noted only that the amount of dust in the lungs did not warrant a diagnosis of pneumoconiosis, not that the dust had some other source than coal mine employment. As discussed above, Dr. Zaldivar's opinion about the cause of emphysema was inconsistent; further, he said that he fully agreed with Dr. Shim who found "coal workers'" on autopsy. Drs. Walker, Rasmussen, and Lee all said that the miner's pulmonary impairment was related to coal dust exposure. Drs. Shim, Rodman, Crisalli, Cinco, and Rasmussen all referred to "coal workers'" or "occupational" pneumoconiosis, and hence at least implicitly agreed that there was a relationship between coal mine work and the pneumoconiosis. Based on this record, it is concluded that the presumption that the pneumoconiosis arose out of coal mine employment has not been rebutted.

In sum, the weight of the credible evidence establishes that Mr. Shuff was totally disabled by pneumoconiosis during his lifetime, and that the pneumoconiosis arose out of coal mine

employment. Hence, entitlement under the Living Miner's claim has been established.

VI. SURVIVOR'S CLAIM

Since the survivor's claim was filed on August 18, 1983, it is to be adjudicated under the regulations found in Part 718. Pursuant to § 718.1(a), "unless the miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982, benefits are payable on survivor's claims filed on or after January 1, 1982, only when the miner's death was due to pneumoconiosis, except where the survivor's entitlement is established pursuant to § 718.306 of this part on a claim filed prior to June 30, 1982." Section 718.306 is not applicable in this case because Mr. Shuff did not die on or before March 1, 1978. Thus, Mrs. Shuff must extablish that her husband's death was due to pneumoconiosis in order to establish entitlement to benefits under the Act.

Section 718.205(c) provides:

For the purposes of adjudicating survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
>
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
>
> (3) Where the presumption set forth at § 718.304 is applicable.
>
> (4) However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principle cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

The presumption of § 718.304 requires evidence of complicated pneumoconiosis which is not present in the instant case. Therefore, § 718.205(c)(3) is not applicable.

The clear weight of the medical evidence in this case is that Mr. Shuff died as the result of cancer of the pancreas with extensive metastases, although the immediate or terminal cause of death was pneumonia. There is no evidence that pneumoconiosis was the direct cause of death or that death resulted from complications of pneumoconiosis. Hence, the central question in this case is whether pneumoconiosis was a substantially contributing cause of death because there is evidence that pneumoconiosis contributed to death insofar as it made the miner more susceptible to pneumonia, which was the immediate cause of death. The narrative medical reports were detailed above. In brief—

—the West Virginia Occupational Pneumoconiosis Board found that pneumoconiosis was not a major contributing cause of death. Since the Board's determination is based on both medical and legal factors, it has limited probative value.

—Dr. Walker, a member of the Board, said that pneumoconiosis was not a major contributing factor in Mr. Shuff's death although it had a substantial relationship insofar as the miner probably died sooner because the miner's susceptibility to pneumonia had been increased as a result of his pneumoconiosis. It appears from Dr. Walker's deposition testimony that he was struggling with the concept of the meaning of "substantially" contributing cause of death.

—Dr. Shim said that Mr. Shuff's pneumoconiosis was minimal, and Mr. Shuff's death was not significantly related to or aggravated by pneumoconiosis.

—Dr. Rodman said that Mr. Shuff's minimal coal workers' pneumoconiosis played no direct or contributory role in Mr. Shuff's death.

—Dr. Crisalli said that pneumoconiosis did not contribute to the miner's death and did not hasten death.

—Dr. Hansbarger found no pneumoconiosis and said that since there was no pneumoconiosis it did not impact on Mr. Shuff's demise.

—Dr. Zaldivar said that death was not related to the miner's severe airway impairment or to coal mine employment. He fully agreed with Dr. Shim's assessment of the case.

—Dr. Cinco found that both chronic obstructive lung disease and coal workers' pneumoconiosis were contributing factors in Mr. Shuff's death, however, they were not the major cause. He did not state whether the contribution was substantial.

—Dr. Rasmussen said that pneumoconiosis was a substantially contributing cause of death insofar as it reduced the chances of surviving metastatic cancer.

—Dr. Lee, Mr. Shuff's treating physician, said that pneumoconiosis did not cause the miner's death or affect the spread of the cancer, and was not a major contributing cause of death. He said that pneumoconiosis was a contributing cause of death insofar as it made the miner more susceptible to the pneumonia which was the immediate cause of death (although the susceptibility to pneumonia was also contributed to by the cancer). Dr. Lee was a bit inconsistent in regard to stating the degree to which pneumoconiosis was a contributing factor, at one point stating that it was a "major" cause. However, an overall reading of his remarks, and his indication of complete agreement with Dr. Shim indicate that Dr. Lee's opinion cannot be characterized as supporting a conclusion that the miner's pneumoconiosis was a substantially contributing cause of death.

—Dr. Teleron in the hospital records of June 1983 did not address whether pneumoconiosis was related to death.

—Drs. MacCallum and Smith found no evidence of occupational pneumoconiosis. Their opinion, however, is not particularly relevant to the cause of death except insofar as it indicates that pneumoconiosis was not present. Given the weight of the pathological and other evidence of

pneumoconiosis contained in the record, their conclusion is not credible.

Hence, Drs. Shim, Rodman, Hansbarger, Crisalli, and Zaldivar all agree that pneumoconiosis was not a substantial cause of death. Dr. Shim's opinion is considered particularly worthy of probative value given that he performed the autopsy and the approval of Drs. Lee and Zaldivar in regard to his assessment of the case. Dr. Cinco's opinion of a contributory relationship between pneumoconiosis and cause of death does not indicate the level of contribution. Only Drs. Walker and Rasmussen clearly state that pneumoconiosis was a substantially contributing cause of death. As noted, Dr. Walker was having a difficult time understanding the concept of substantial relationship to death for purposes of the federal black lung act. Further, all indication in this record is that the contributing relationship between pneumoconiosis and the miner's death in this cause is that increased the miner's susceptibility to pneumonia. Thus, pneumoconiosis as a causal factor is two levels removed from the major cause of death — the pancreatic cancer.

Without overemphasizing the point, it is clear that Mr. Shuff's cancer was going to result in his death, and that the death was imminent. Certainly it appears that pneumoconiosis may have hastened that death insofar as it made him more susceptible to pneumonia; but the cancer itself made Mr. Shuff more to pneumonia. Further, it appears that cigarette smoking was a contributory factor in the miner's lung disease and that it too may have contributed to susceptibility to pneumonia.

Based on the fact that most of the medical opinion indicates that pneumoconiosis was not a substantially contributing cause of death, and that the evidence of the relationship between pneumoconiosis and death in this case is somewhat extenuated, it is concluded that Mrs. Shuff has failed to establish entitlement pursuant to § 718.205(c).

VII. ENTITLEMENT

The record establishes entitlement to benefits pursuant to the Living Miner's claim, but not pursuant to the Survivor's Claim.

The date of entitlement to benefits can be no earlier than the first day of the month in which the miner permanently ceased coal mine work. *McFarland v. Peabody Coal Co.*, 8 BLR 1-163 (1985); *Remo v. Director, OWCP*, 6 BLR 1-856 (1984); *Tackett v. Peabody Coal Co.*,6 BLR 1-526 (1983). In this case, Mr. Shuff did not cease coal mine work until April 19, 1983, and, therefore, benefits commence April 1, 1983.

Pursuant to § 725.502(b), benefits are to terminate with the month before the month during which eligibility terminates. Mr. Shuff died on July 28, 1983. Hence, benefits on the Living Miner's claim terminate on the last day of June 1983.

Since the entitlement pursuant to the Living Miner's claim did not result from a claim filed prior to January 1, 1982, Mrs. Shuff had to establish entitlement under the separate Survivor's Claim in order to continue to receive benefits as a survivor.

VIII. ATTORNEY'S FEES

No award of attorney's fees for services in behalf of the Claimant's claim is made herein because no application has been received from counsel. A period of thirty (30) days is hereby allowed for Claimant's counsel to submit an application. The application must conform to 20 C.F.R. §§ 725.365 and 725.366, which set forth the criteria on which the request will be considered. The application must be accompanied by a service sheet showing that service has been made upon all parties, including the Claimant, and the Solicitor as counsel for the Director. Parties so served have fifteen (15) days following receipt of any such application within which to file their objections, if any. Counsel is forbidden by law to charge the Claimant any fee in the absence of the approval of such application.

IX. ORDER

The Employer, Cedar Coal Company, is hereby ordered to:

1. Pay to Jewell L. Shuff, widow of Paul Shuff, all benefits to which Mr. Shuff was entitled under the Act, commencing April 1, 1983, augmented by reason of his dependents described above, and ending the last day of June 1983.

2. Pay to an appropriate party as authorized by § 725.504, all medical benefits to which he may have been entitled.

ROBERT L. HILLYARD
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and order may appeal it to the Benefits Review Board, 1111 20th Street, N.S., Suite 757, Washington, D.C. 20036

SERVICE SHEET

Case Name: JEWELL L. SHUFF, Widow of PAUL SHUFF
Case No. 87-BLA-2667

Title of Document: DECISION AND ORDER – AWARDING BENEFITS IN LIVING MINER'S CLAIM AND DENYING BENEFITS IN SURVIVOR'S CLAIM

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United States Court of Appeals,
Fourth Circuit.

No. 91-2572.

JEWELL SHUFF, WIDOW OF PAUL SHUFF,

Petitioner,

v.

CEDAR COAL COMPANY;
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Argued April 8, 1992.

Decided June 18, 1992.

Miner's surviving spouse appealed denial of survivor's benefits under Black Lung Benefits Act. The Court of Appeals, Ervin, Chief Judge, held that: (1) survivor's benefits under Act could not be denied on basis that death from metastasized pancreatic cancer was imminent and that cancer itself made miner more susceptible to pneumonia, although pneumoconiosis may have hastened death, and (2) permitting award of survovor's benefits if pneumoconiosis hastened death in any way is reasonable interpretation of regulation treating death as due to pneumoconiosis if pneumoconiosis was substantially contributing cause or factor leading to miner's death.

Reversed and remanded.

Edward Waldman, argued, Office of the Sol., U.S. Dept. of Labor, Washington, D.C., W. Richard Staton (G. Todd Houck, on the brief), Moler & Staton, Mullens, W.Va., argued, for petitioner.

David Steven Russo, Robinson & McElwee, Charleston, W.Va., for respondent.

David S. Fortney, Deputy Sol. of Labor, Donald S. Shire, Associate Sol., Barbara J. Johnson, Counsel for Appellate Litigation, Office of the Solicitor, U.S. Dept. of Labor, on the brief, Washington, D.C.

Before ERVIN, Chief Judge, MURNAGHAN, Circuit Judge, and TILLEY, United States District Judge for the Middle District of North Carolina, sitting by designation.

ERVIN, Chief Judge:

Jewell L. Shuff seeks survivor's benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, in connection with her husband's death. She argues that the Administrative Law Judge (''ALJ'') and the Benefits Review Board (''BRB'') applied too stringent a standard in evaluating whether pneumoconiosis was a ''substantially contributing cause or factor'' leading to her husband's death. We agree with Mrs. Shuff, reverse the BRB and remand the case for further proceedings.

I.

The miner, Paul B. Shuff, filed a claim for benefits under the Black Lung Benefits Act on May 24, 1983. While his claim was pending, Mr. Shuff died on July 28, 1983. Mr. Shuff's widow, Jewell L. Shuff, the claimant here, filed a claim for survivor's benefits on August 18, 1983. Cedar Coal Company (''Cedar Coal'') is, by agreement of all the parties, the responsible operator potentially liable for benefits.

After both claims were administratively denied. Mrs. Shuff requested a hearing before an ALJ. On August 29, 1989, the ALJ issued a decision and order awarding benefits on the living miner's claim and denying benefits on the survivor's claim. The ALJ found that Mr. Shuff had been totally disabled by pneumoconiosis and, therefore, was entitled to benefits from April 1983, when Mr. Shuff terminated his coal

mine employment, until June 1983 the month before Mr. Shuff died. The ALJ found that pneumoconiosis was not a "substantially contributing cause of death," however, and therefore ruled that Mrs. Shuff was not entitled to survivor's benefits under 20 C.F.R. § 718.205(c).*[1]

Mrs. Shuff appealed the ALJ's determination to the BRB, and Cedar Coal cross-appealed the grant of benefits on the living miner's claim. The BRB affirmed the ALJ on both issues. Mrs. Shuff appeals to this court the denial of survivor's benefits. Cedar Coal does not appeal the grant of benefits on the living miner's claim.

II.

[1] The medical evidence is clear, and the ALJ found, that the predominant cause of Mr. Shuff's death was pancreatic cancer which had metastasized, affecting other internal organs. However, the immediate precipitating cause of death, according to the bulk of the medical evidence, was pneumonia. The ALJ correctly observed:

> [T]he central question in this case is whether pneumoconiosis was a substantially contributing cause of death . . . insofar as it made the miner more susceptible to pneumonia, which was the immediate cause of death.

J.A. at 22. The ALJ concluded that while "it appears that pneumoconiosis may have hastened . . . death," the fact that Mr. Shuff's death was "imminent" from the pancreatic cancer, and that "the cancer itself made Mr. Shuff more susceptible to pneumonia," meant that pneumoconiosis was not a

1. According to 20 C.F.R. § 718.205(a), "Benefits are provided to eligible survivors of a miner whose death was due to pneumoconiosis." Under 20 C.F.R. § 718.205(c), for claims filed on or after January 1,1982, "death will be considered to be due to pneumoconiosis if . . . pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or . . . the death was caused by complications of pneumoconiosis . . . ." Mrs. Shuff's claim was filed after January 1, 1982, and therefore was properly evaluated under this regulation.

substantially contributing cause of death. J.A. at 24. Accordingly, the ALJ denied survivor's benefits. The BRB found that the ALJ "acted within his discretion in concluding" that the medical opinions did not establish that pneumoconiosis was a substantially contributing factor in the miner's death. J.A. at 30.

[2] The Director, Office of Workers' Compensation Programs, United States Department of Labor (the "Director" or "DOWCP"), has adopted the position that "pneumoconiosis substantially contributes to death if it serves to hasten death in any way." DOWCP Br. at 8. The Director's interpretation of the regulations is entitled to substantial deference from this court. *Pauley* v. *BethEnergy Mines, Inc.*, ____ U.S. ____, ____, 111 S.Ct. 2524, 2534, 115 L.Ed.2d 604, 624 (1991); *Adkins* v. *Director, OWCP*, 878 F.2d 151, 152-53 (4th Cir.1989).

The Third Circuit has adopted the Director's position on this issue. *See Lukosevicz* v. *Director, OWCP*, 888 F.2d 1001 (3d Cir.1989). The facts of *Lukosevicz* were nearly identical to those of the present case. In that case, a miner who was totally disabled by pneumoconiosis also died of pancreatic cancer. The physician who conducted the autopsy indicated that the miner suffered from pulmonary emphysema related to his pneumoconiosis, and that " 'this condition shortened Mr. Lukosevicz' life, albeit briefly.' " *Id.* at 1003 (quoting letter of Dr. Ronald K. Wright). The BRB affirmed denial of survivor's benefits to Lukosevicz' widow, despite the Director's interpretation of "substantially contributing cause" as any condition that hastens the miner's death. The Third Circuit, in a well reasoned opinion, analyzed the legislative history of the Black Lung Benefits Act and the history of the Department of Labor's regulations and concluded that the Director's position was not an unreasonable interpretation of the regulations. Accordingly, the *Lukosevicz* court adopted the Director's position that pneumoconiosis should be considered a "substantially contributing cause" of a miner's death if it

actually hastened the miner's death. *Id.* at 1006. We agree with *Lukosevicz*, for the reasons articulated therein, and likewise adopt the Director's position.

Cedar Coal Company argues that, contrary to the holding of *Lukosevicz*, the Director's interpretation *is* unreasonable because, by treating *any* hastening of death as a "substantially contributing cause," the interpretation reads the word "substantially" out of the regulation. This argument misses the mark. Cedar Coal acknowledges that "substantially contributing" is not defined anywhere in the regulations. Without further refinement, the phrase provides an unworkable standard for evaluating the degree of causative involvement pneumoconiosis must have in a miner's death in order for that death to be considered "due to pneumoconiosis." The Director, by interpreting "substantially contributing" as inclusive of any condition that hastens the miner's death, has attempted to give substance to the regulation. Rather than disregarding the word "substantially," the Director's interpretation seeks to provide the phrase with a workable definition. As a result, we reject Cedar Coal's argument, and we defer to the Director's reasonable interpretation of the regulation.

We note that in the present case the BRB made no effort to distinguish *Lukosevicz*. The BRB noted only that the present case arose within the jurisdiction of the Fourth Circuit rather than the Third. We do not consider this a legally persuasive ground for distinction. Likewise, the BRB gave no explanation for its rejection of the Director's interpretation of the regulations. We are mystified as to how the BRB could have reached its decision in the face of such obviously relevant authority, and we are left with the distinct impression that the BRB did not, in this case, carry out its statutority imposed responsibilities in good faith. We trust that, in the future, the BRB will attempt to support its decisions with at least a semblance of legal reasoning.

III.

[3] The final issue we must decide is whether the ALJ's statement that "[c]ertainly it appears that pneumoconiosis may have hastened . . . death insofar as it made [Mr. Shuff] more susceptible to pneumonia," should be considered to be a finding that pneumoconiosis *did* hasten Mr. Shuff's death, entitling Mrs. Shuff to benefits, or whether we must remand the case for a finding on whether the pneumoconiosis did, in fact, hasten Mr. Shuff's death. In light of the conflicting medical evidence and the inconclusive nature of the ALJ's statement, we find that we must remand the case to the BRB with instructions to vacate its order and to remand the case to the ALJ for a definitive finding as to whether the pneumoconiosis actually hastened Mr. Shuff's death. Accordingly, this case is hereby

REVERSED AND REMANDED

BRB Nos. 89-2836 BLA
and 89-2836 BLA/A
OWCP No. 232-40-2491

JEWELL L. SHUFF, Widow of
PAUL SHUFF
Claimant-Petitioner
Cross-Respondent
v.

CEDAR COAL COMPANY

Employer-Respondent
Cross-Petitioner
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

DATE ISSUED: APRIL 25, 1991

DECISION AND ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Anthony J. Cicconi (Shaffer & Shaffer), Madison, West Virginia, for claimant.

David L. Yaussy (Robinson & McElwee), Charleston, West Virginia, for employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NEUSNER, Administrative Law Judge.*

PER CURIAM:

Claimant, the miner's widow, appeals and the employer cross-appeals the Decision and Order (87-BLA-2667) of Administrative Law Judge Robert L. Hillyard awarding benefits on the claim filed by the miner and denying benefits on the claim filed by the surviving spouse pursuant to the provisions of Title IV of the Federal Coal Mine Health and

* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921(b)(5) (Supp. V 1987).

Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). The administrative law judge found at least sixteen years of coal mine employment. Considering both the miner's and survivor's claims pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment to establish total disability.[1] *See* 20 C.F.R. §§ 718.202(a), 718.203(b), 718.204(c); Decision and Order at 15-17, 20-21. The administrative law judge also found that the evidence of record was sufficient to establish that the miner's total disability was due to pneumoconiosis. *See* 20.C.F.R. §718.204(b); Decision and Order at 20. The administrative law judge further found, however, that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to *See* 20 C.F.R. § 718.205(c). Accordingly, benefits were awarded to claimant pursuant to the miner's claim, but were denied on the claim filed by the survivor. On appeal, claimant contends that the administrative law judge erred in failing to find that pneumoconiosis was a significantly contributing cause of the miner's death as pneumoconiosis hastened the miner's demise. Employer responds, asserting that the administrative law judge's denial of survivor's benefits is supported by substantial evidence and cross-appeals contending that the administrative law judge erred in finding that the miner's total disability was due to pneumoconiosis in light of *Wilburn V. Director, OWCP*, 11 BLR 1-135 (1988). The Director, Office of Worker's Compensation Programs, filed a letter indicating he would not respond in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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1. These findings are not challenged on appeal, and therefore, they are affirmed. *See Skrack* v. *Island Creek Coal Co,*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when claimant meets her burden of establishing that the miner's death was due to pneumoconiosis.[2] *See* 20 C.F.R. §§ 718.1, 718.205, 725.201; *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The administrative law judge, in the instant case, acted within his discretion in concluding that the preponderance of the medical opinions of record were insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).[3] This finding is supported by substantial evidence and contains no reversible error. *See 20 C.F.R. § 718.205(c); Claimant's Exhibits 1, 3, 5, 12, 17; Employer's Exhibits 1, 3, 5, 8, 10, 12, 13; Director's Exhibits 14, 15, 25; Decision and Order at 24; Foreman v. Peabody Coal Co.*, 8 BLR 1-371 (1985); *Neeley, supra*; *see also Hawkins v. Peabody Coal Co.*, 11 BLR 1-157 (1988); *Peskie v. United States Steel Corp.*, 8 BLR 1-126, 1-128 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *Piccin v. Director, OWCP*, 6 BLR 1616 (1983). We therefore affirm the administrative law judge's denial of benefits on the survivor's claim.

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that the miner suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R.

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2. Since claimant's application for benefits, in the instant claim, was filed on August 18, 1983, 20 C.F.R. § 718.205(c) sets forth the applicable criteria for establishing death due to pneumoconiosis. *See* Director's Exhibit 2.

3. We note claimant's reliance upon *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2100 (3d Cir. 1989). However, we decline to apply *Lukosevicz, supra*, in the instant case, as this claim arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989); Director's Exhibit 3.

§§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Employer, in his cross-appeal, contends that the administrative law judge errored in finding that the miner's total disability was due to pneumoconiosis. This contention is without merit. *See Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 268 (4th Cir. 1990). The administrative law judge, in the instant case, permissibly concluded, after weighing all of the relevant evidence, that the opinions of Drs. Walker, Rasmussen and Lee were sufficient to establish that the miner's total disability was due to pneumoconiosis. *See* Claimant's Exhibits 3, 5, 17; Employer's Exhibits 3, 8; Decision and Order at 20; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984); *Wilson v. U.S. Steel Corp.*, 6 BLR 1-1055 (1984). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-254 (1984), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Clark, supra.* Consequently, we affirm the administrative law judge's award of benefits in the miner's claim.

Accordingly, the Decision and Order of the administrative law judge awarding benefits on the miner's claim and denying benefits on the survivor's claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

FREDERICK D. NEUSNER
Administrative Law Judge

Dated this 25th day
of April 1991

CERTIFICATE OF SERVICE

BRB No. 89-2836 BLA: Jewell L. Shuff (Widow of Paul Shuff) v. Cedar Coal Company and Director, Office of Workers' Compensation Programs (Case No. 87-BLA-2667) (OWCP No. 232-40-2491)

I certify that this Decision and Order was sent this day to:

April 25, 1991
(Date)

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Judge Robert L. Hillyard
U.S. Department of Labor
Suite 900
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Cincinnati, OH 45202

30 USCS § 901

§ 901. Congressional findings and declaration of purpose; short title

• • •

It is, therefore, the purpose of this title to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease or who were totally disabled by this disease at the time of their deaths; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

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30 USCS § 922

§ 922. Payment of benefits

• • •

(2) In the case of death of a miner due to pneumoconiosis or of a miner receiving benefits under this part, benefits shall be paid to his widow (if any) at the rate the deceased miner would receive such benefits if he were totally disabled.

• • •

§ 718.205 Death due to pneumoconiosis

(a) Benefits are provided to eligible survivors of a miner whose death was due to pneumoconiosis.

• • •

(c) For the purpose of adjudicating survivors' claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if any of the following criteria is met:

(1) Where competent medical evidence established that the miner's death was due to pneurnoconiosis, or

(2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

(3) Where the presumption set forth at § 718.304 is applicable.

(4) However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury of the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

• • •

FILED July 16, 1992

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 91-2572

89-2836-BLA

JEWELL SHUFF, widow of Paul Shuff,

Petitioner,

v.

CEDAR COAL COMPANY;
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
U. S. DEPARTMENT OF LABOR,

Respondent.

On Petition For Rehearing with Suggestion for Rehearing In Banc

Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Ervin, with the concurrence of Judge Murnaghan, and Judge Tilley.

For the Court,

/s/ Bert M. Montague
Clerk

CONGRESSIONAL RECORD – HOUSE
December 16, 1981
31743

Mr. PERKINS.

• • •

I do want to stress the intent of the framers of this legislation with respect to the so-called unrelated death benefits issue.

A question has been raised regarding the proper interpretation of the provisions in the bill relating to the availability of survivor's benefits in those cases where the miner's death is unrelated to pneumoconiosis. We have been very concerned about the authority in current law to pay survivor's benefits in those situations; H.R. 5159, as amended by the Senate, reflects that concern by eliminating prospectively the authority to initiate benefit payments when that happens. The administration expressed these same concerns in Deputy Under Secretary of Labor Robert Collyer's testimony before the Senate Labor Subcommittee, December 14, 1981.

I want to emphasize, however, that it is not the purpose of H.R. 5159 as amended by the Senate to deny survivor's benefits when complications of pneumoconiosis have caused a miner's death or where pneumoconiosis was a substantially contributing factor to that death. For example, pneumoconiosis may have been a substantially contributing cause of death in a case where the principal cause of death was pneumonia.

Of course, survivors would not be eligible for benefits in those situations where death was caused by a traumatic injury or an unrelated medical condition.

• • •

CONGRESSIONAL RECORD – SENATE
December 16, 1981
31976

Mr. HATCH.

• • •

The bill also addresses what many regard is the underlying reason for the trust fund's insolvency – namely, the eligibility criteria. This without question has evoked tremendous controversy. Many have contended that the current criteria are simply too loose and that thousands of claimants who are not truly disabled have received benefits. Recent studies by the General Accounting Office have tended to confirm this.

• • •

Eliminate survivors' unrelated death benefits. With respect to claims filed on or after the effective date, amends the act by limiting benefit payments to only situations where it can be established that the death of the miner was due to pneumoconiosis.

• • •

Mr. President, a question has been raised regarding the proper interpretation of the provisions in the bill relating to the availablity of survivor's benefits in those cases where the miner's death is unrelated to pneumoconiosis. We have been very concerned about the authority in current law to pay survivor's benefits in those situations. S. 1922, and the pending amendments, reflects that concern by eliminating prospectively the authority to initiate benefit payments when that happens. The administration expressed these same concerns in Deputy Under Secretary of Labor Robert Collyer's testimony before the Senate Labor Subcommittee, December 14, 1981.

I want to emphasize, however, that it is not the purpose of S. 1922, and the pending amendments, to deny survivor's

benefits when complications of pneumoconiosis have caused a miner's death or where pneumoconiosis was a substantially contributing factor to that death. For example, pneumoconiosis may have been a substantially contributing cause of death in a case where the principal cause of death was pneumonia.

Of course, survivors would not be eligible for benefits in those situations where death was caused by a traumatic injury or an unrelated medical condition.

• • •

FEDERAL REGISTER—RULES AND REGULATIONS
Tuesday, May 31, 1983
Vol. 48, No. 105
24277

• • •

(m) The Hatch-Perkins statement contains several key sentences explaining the intended future meaning of "death due to pneumoconiosis." They include, "I want to emphasize, however, that it is not the purpose of [the changes] to deny survivor's benefits when complications of pneumoconiosis have caused a miner's death or where pneumoconiosis was a substantially contributing factor to that death. For example pneumoconiosis may have been a substantially contributing cause of death where the principal cause of death was pneumonia." Two paragraphs later the statement continues, "Once the Labor Department has received medical evidence establishing that pneumoconiosis was the cause of death or a substantially contributing factor to the death, the survivor will receive benefits, unless the weight of the evidence developed by the Labor Department's Deputy Commissioner or by a responsible operator establishes that the death was unrelated to pneumoconiosis." Id. the quoted sentences refer to three possible relationships between the miner's death and pneumoconiosis, each of which is intended to be compensable. First is the situation in which "medical evidence establish[es] that pneumoconiosis was the cause of death." This basis for entitlement is discussed in paragraph (k) above and is now incorporated in paragraph (c)(1). The second situation is one in which "pneumoconiosis was a substantially contributing factor to [or cause of] that death." The third situation is where "complications of pneumoconiosis have caused a miner's death." These two additional bases for entitlement are now incorporated into paragraph (c)(2).

(n) Several comments objected to the inclusion in the proposed version of this regulation of the example quoted in paragraph (m) above. It is contended that the example is

"general", "hypothetical", "of no value", "confusing", and capable of being of seriously misinterpreted. The Department agrees that the example—viewed in isolation—can be misconstrued. However, the example which was used as an illustration of a potentially compensable claim, i.e., that "pneumoconiosis may have been a substantially contributing cause of death in a case where the principal cause of death was pneumonia." must be understood in the context of the Hatch-Perkins statement as a whole. In addition to the portions of the statement quoted in paragraph (m) above, the statement also includes the following statement of limitation, "Of course, survivors would not be eligible for benefits in those situations where death was caused by a traumatic injury or an unrelated medical condition." Taken as whole, the statement makes clear that no benefits are payable where the cause of the miner's death was related to pneumoconiosis. However, the statement makes equally clear that pneumoconiosis need not the "principal", sole, primary or proximate cause of the miner's death in order for the survivor's claim to be compensable. Considered in this light, the example was intended to illustrate those basic concepts in the following manner: the survivor's claim is compensable if the evidence demonstrates that pneumoconiosis was a substantially contributing cause of death even though the principal cause of death was pneumonia. In order to avoid possible misinterpretations, such as death due to pneumonia is compensable if pneumoconiosis was found to be present at the time of death or even that pneumonia may be indicative of the presence of pneumoconiosis, the use of the pneumonia example has been deleted from the regulation as now promulgated. However, the basic concept which it illustrates has been incorporated into paragraph (c)(4).

• • •

No. 92-662

Supreme Court, U.S.
FILED
DEC 11 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

CEDAR COAL COMPANY,

Petitioner,

vs.

JEWELL SHUFF, SURVIVOR OF PAUL SHUFF,

Respondent,

-and-

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JEWELL SHUFF

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BEST AVAILABLE COPY

QUESTION PRESENTED

1. Whether a petition for a writ of certiorari should be refused when there is a consistency of decisions within the United States Courts of Appeals?

LIST OF PARTIES AND RULE 29.1 STATEMENT

Respondent hereby incorporates by reference the List of Parties and Rule 29.1 Statement filed by the petitioner in the original petition for a writ of certiorari.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties and Rule 29.1 Statement	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	2
Statutes and Regulations Involved	2
Statement of the Case	2
Summary of Argument	5
Reasons for Denying the Writ	5
I. The opinion below is consistent with the remedial purposes of the statute, the legislative history of the Black Lung Benefits Act, and interpreting regulations of the Department of Labor	6
Conclusion	8
Appendix	1a

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Lukosevicz v. Director, OWCP, 888 F.2d 1001 (3d Cir. 1989) 4, 5

Peabody Coal Co. v. Director, OWCP, 1992 U. S. Lexis 20199 (1992) 5

Statute Cited:

Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 et seq. 5, 6, 7, 8

Rule Cited:

Supreme Court Rule 10 5

Other Authorities Cited:

20 C.F.R. § 718.201 3

20 C.F.R. § 718.202(a)(4) 3

20 C.F.R. § 718.205 6

48 Fed. Reg. 24276-88 (1983) 7

127 Cong. Rec. 31,745-76 (1981) 6

Contents

	Page
127 Cong. Rec. 31,747	6
127 Cong. Rec. 31,976-77 (1981)	6
127 Cong. Rec. 31,978	6

No. 92-662

In The

Supreme Court of the United States

October Term, 1992

CEDAR COAL COMPANY,

Petitioner,

vs.

JEWELL SHUFF, SURVIVOR OF PAUL SHUFF,

Respondent,

-and-

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Counsel for the respondent accepts the petitioner's recitation of the opinions below upon which the original petition is sought.

STATEMENT OF JURISDICTION

Counsel for the respondent accepts the petitioner's recitation of the jurisdiction of the underlying tribunals, and this Court.

STATUTES AND REGULATIONS INVOLVED

Counsel for the respondent accepts the petitioner's recitation of the statutes and regulations involved in this claim.

STATEMENT OF THE CASE

The decedent, Paul Shuff, was an underground coal miner for approximately seventeen years. He worked for Eastern Associated Coal Corporation as an underground coal miner from April, 1951, until September, 1952. He again worked underground for Eastern from September, 1955, through May, 1957. Thereafter, Mr. Shuff worked for various coal companies in the southern West Virginia area from December, 1969, until May, 1983. His last cumulative period of one year coal mine employment was with Cedar Coal Company, where he worked as a roof bolter. He continued to work at Cedar Coal Company until a few months prior to his death. The Administrative Law Judge found that Mr. Shuff had at least sixteen years of qualifying experience.

Sometime in 1983, Mr. Shuff was discovered to suffer from cancer of the pancreas. He left his employment, and subsequently filed for total disability benefits in April, 1983. These benefits were awarded, and are not the subject of this appeal. Mr. Shuff died on July 28, 1983. His widow, Jewell Shuff, filed a claim for survivor's benefits on August 18, 1983.

Evidence produced at the hearing established that Mr. Shuff had developed pneumonia immediately prior to his death.

In addition to the evidence adduced at the hearing which established that Mr. Shuff was totally disabled due to pneumoconiosis, substantial evidence was presented concerning the relationship between his pneumonia, his black lung disease, and his death. This evidence included review of autopsy results, and testimony from several physicians, including Mr. Shuff's treating physician.

Evidence was submitted by Dr. Shim, Dr. Walker, Dr. Rodman, Dr. Crisalli, Dr. Hansbarger, and Dr. Zaldivar which variously concluded that Mr. Shuff had a minimal to significant impairment, and which all concluded that the pneumoconiosis did not substantially cause or contribute to Mr. Shuff's death.

Conversely, evidence was introduced by Dr. Cinco, Dr. Rasmussen, and Dr. Lee, who was Mr. Shuff's treating physician, indicating that Mr. Shuff did in fact suffer from substantial pulmonary impairment, and that Mr. Schuff's pneumoconiosis was a substantially contributing cause of Mr. Shuff's death from pneumonia.

In assessing the medical evidence, including the medical testimony, x-ray results, and pulmonary function tests, the Administrative Law Judge found that the weight of the evidence showed that Mr. Shuff was totally disabled by pneumoconiosis which resulted from his qualifying employment.

The Administrative Law Judge found pneumoconiosis by autopsy and as defined in 20 C.F.R. §§ 718.201 and 202(a)(4). He also found that the miner was totally disabled by pneumoconiosis. With regard to the survivor's claim, the Administrative Law Judge found that the miner died:

> as a result of cancer of the pancreas with extensive metastases, *although the immediate*

> *or terminal cause of death was pneumonia.* There is no evidence that the pneumoconiosis was a direct cause of death or the death resulted from complications of pneumoconiosis. Hence the central question in this case is whether pneumoconiosis was a substantially contributing cause of death because *there is evidence that pneumoconiosis contributed to death insofar as it made the miner more susceptible to pneumonia, which was the immediate cause of death.*[1]

The Administrative Law Judge also found that "all indication in this record is that the contributing relationship between pneumoconiosis and the miner's death in this cause is that [it] increased the miner's susceptibility to pneumonia."[2]

Using this evidence to assess the survivor's claim, the Administrative Law Judge found that the terminal cause of Mr. Shuff's death was pneumonia. He further found that the pneumoconiosis may have hastened his death. This finding was not controverted by the respondent, and was not rejected by the Benefits Review Board.

The Fourth Circuit, in an opinion written by Chief Judge Ervin, affirmed and adopted the interpretation of the applicable regulations by the Director, Office of Workers' Compensation Programs, United States Department of Labor (hereinafter, "the Director"), that pneumoconiosis substantially contributes to death if it serves to hasten death in any way. The court cited with approval a similar opinion by the Third Circuit in *Lukosevicz v. Director,*

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1. Decision and Order at p. 22 (emphasis supplied).

2. Decision and Order at p. 24.

OWCP, 888 F.2d 1001 (3d Cir. 1989), in which the legislative history of the Black Lung Benefits Act and the resultant regulations were analyzed and the same conclusion reached. Importantly, the Fourth Circuit remanded the case to the Benefits Review Board with instructions to vacate its order, and to remand the case to the Administrative Law Judge for a definitive finding as to whether the pneumoconiosis actually hastened Mr. Shuff's death.

SUMMARY OF ARGUMENT

The petition for a writ should be refused because of the consistency of decisions in the United States Court of Appeals for the Fourth, Third and Seventh Circuits, and because the standard is consistent with the remedial purposes of the Black Lung Act and the Director's interpretative regulations. The petition for a writ should further be refused because the opinions below are consistent with the Director's interpretations of the Act and legislative history. In such cases, these interpretations are entitled to judicial deference.

REASONS FOR DENYING THE WRIT

A review on a writ of certiorari is not a matter of right, but judicial discretion. Sup. Ct. R. 10. There are no special nor important reasons for granting the petition. The decision of the United States Court of Appeals for the Fourth Circuit below is not in conflict with the decision of another United States Court of Appeals. To the contrary, the decision below is in complete agreement with the similar decisions in *Lukosevicz v. Director*, 888 F.2d 1001 (3d Cir. 1989), and *Peabody Coal Co. v. Director, OWCP*, 1992 U. S. App. Lexis 20199, p. 17, August 17, 1992. These three Circuit Courts have each elucidated a standard consistent with the Act and with congressional intent. Further, the Fourth Circuit's remand of this case for determination in light of the adopted standard indicates that the standard is not as

insurmountable as petitioner suggests.

I.

THE OPINION BELOW IS CONSISTENT WITH THE REMEDIAL PURPOSES OF THE STATUTE, THE LEGISLATIVE HISTORY OF THE BLACK LUNG BENEFITS ACT, AND INTERPRETING REGULATIONS OF THE DEPARTMENT OF LABOR.

In the 1981 amendments to the Black Lung Benefits Act, Congress acted to tighten eligibility requirements for survivor's benefits. Specifically, Congress attempted to stop the award of survivor's benefits where death had been due to circumstances unrelated to the miner's pneumoconiosis.[3] The congressional history further emphasizes that Congress intended to avoid an award of benefits where the cause of death was totally unrelated to the miner's pneumoconiosis, such as fatal accidents.[4] Interestingly, in floor discussions of the applicability of the revised statute, records of both the House and Senate debates cite as an example of entitlement where the principal cause of death is pneumonia, and that pneumoconiosis may be a substantial contributing cause.[5]

In enacting regulations pursuant to the new statutory language, the Department of Labor promulgated the current language in § 718.205. In comments to the rule, the Department emphasized that benefits were not payable where the cause of death is unrelated to pneumoconiosis. However, the Department

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3. 127 Cong. Rec. 31,977 (1981).

4. 127 Cong. Rec. 31,745-76, 31,976-77 (1981).

5. *Id.* at 31,747, 31,978.

further stated that pneumoconiosis need not be the "principal, sole, primary or proximate cause of the miner's death in order for the survivor's claim to be compensable." [6]

In the instant case, the uncontroverted evidence is that Mr. Shuff, although dying of cancer, died of pneumonia. It is further uncontroverted that Mr. Shuff's pneumoconiosis was a substantial factor in causing his death from pneumonia. To argue that Mr. Shuff was going to die from his pancreatic cancer misses the point. The Black Lung Benefits Act clearly awards benefits in any circumstance where there is a direct relationship between the pneumoconiosis and the miner's death. The medical evidence and the Administrative Law Judge's findings support the relationship between Mr. Shuff's penumonia and his black lung disease.

The Fourth Circuit affirmed the standard adopted by the Director as being consistent with the remedial purposes of the Black Lung Benefits Act. Importantly, the court found the medical evidence conflicting, and the finding of the Administrative Law Judge to be inconclusive. Hence the case was remanded for a definitive finding as to whether the pneumoconiosis actually hastened Mr. Shuff's death.

It is entirely possible upon remand that the Administrative Law Judge will find that the medical evidence does not establish entitlement to survivor's benefits. Thus, the standard adopted by three Circuit Courts of Appeals cannot be said to be "novel and untenable," as urged in the concluding section of the petition.

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6. 48 Fed. Reg. 24,276-88 (1983).

CONCLUSION

Based upon legislative history and the remedial purpose of the Black Lung Benefits Act, the Director issued interpretive regulations which are the subject of this claim. It is axiomatic that such interpretations are entitled to judicial deference unless plainly wrong. Three Circuit Courts of Appeals have ruled that the standard is correct. Therefore, the petition for writ should be denied.

Respectfully submitted,

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APPENDIX

Respondent hereby incorporates by reference the Appendix filed by the petitioner in the original petition for a writ of certiorari.

Supreme Court, U.S.
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DEC 28 1992
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No. 92-662

In the Supreme Court of the United States

OCTOBER TERM, 1992

CEDAR COAL COMPANY, PETITIONER

v.

JEWELL SHUFF, SURVIVOR OF PAUL SHUFF, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether pneumoconiosis ("black lung disease") is a "substantially contributing cause or factor" leading to a miner's death, within the meaning of 20 C.F.R. 718.205(c)(2), when the disease hastens but is not the predominant cause of death.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Bonessa v. *United States Steel Corp.*, 884 F.2d 726 (3d Cir. 1989)	6
Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & A. R.R.*, 389 U.S. 327 (1967)	4
Clark v. *Director, OWCP*, 9 Black Lung Rep. (MB) 1-205 (1986), aff'd in part and rev'd in part, 838 F.2d 197 (6th Cir. 1988)	7
Compton v. *Inland Steel Coal Co.*, 933 F.2d 477 (7th Cir. 1991)	9
Hawkins v. *Director, OWCP*, 907 F.2d 697 (7th Cir. 1990)	6
Lollar v. *Alabama By-Prods. Corp.*, 893 F.2d 1258 (11th Cir. 1990)	6
Lukosevicz v. *Director, OWCP*, 882 F.2d 1001 (3d Cir. 1989)	3, 5, 7, 9
Mangus v. *Director, OWCP*, 882 F.2d 1527 (10th Cir. 1989)	6, 7
Peabody Coal Co. v. *Director, OWCP*, 972 F.2d 178 (7th Cir. 1992)	4-5
Potomac Elec. Power Co. v. *Director, OWCP*, 449 U.S. 268 (1980)	7
Robinson v. *Pickands Mather & Co.*, 914 F.2d 35 (4th Cir. 1990)	6, 9

Statutes and regulations: Page

Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* 2
30 U.S.C. 901(a) 2
30 U.S.C. 902(c) 2
30 U.S.C. 921(c)(2) 9
30 U.S.C. 922(a) 2
30 U.S.C. 922(a)(1) 6
30 U.S.C. 922(a)(2) 5
30 U.S.C. 932(c) 2
30 U.S.C. 936(a) 2
33 U.S.C. 921(b) 7
20 C.F.R.:
Section 701.202(f) 2
Section 718.201 7
Section 718.205(b)(2) 9
Section 718.205(c) 6
Section 718.205(c)(2) 2, 5, 6, 8
Section 718.205(c)(4) 2
Section 801.102(a)(6) 7

Miscellaneous:

127 Cong. Rec. (1981):
p. 31,747 8
p. 31,978 8
48 Fed. Reg. (1983):
p. 24,276 8
p. 24,277 ..... 8, 9
p. 24,278 9
2 Restatement (Second) of Torts (1965) 5
Webster's II New Riverside University Dictionary (1988) 5

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34a-39a) is reported at 967 F.2d 977. The decision and order of the Benefits Review Board (Pet. App. 40a-45a) and the decision and order of the administrative law judge (Pet. App. 1a-33a) are not officially reported.

JURISDICTION

The court of appeals entered its judgment on June 18, 1992, and denied a petition for rehearing on July 16, 1992. Pet. App. 48a. The petition for a writ of certiorari was

iled on October 14, 1992. The jurisdiction of this Court i invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Black Lung Benefits Act, 30 U.S.C. 901 *t seq.*, benefits are payable to miners who are totally isabled by pneumoconiosis and to survivors of miners hose deaths were "due to" pneumoconiosis. 30 U.S.C. 01(a), 922(a), 932(c). The Secretary of Labor, who has uthority to administer the statute and issue appropriate egulations, 30 U.S.C. 902(c), 936(a), has provided that a eath is "due to" pneumoconiosis "[w]here pneumoconiosis was a substantially contributing cause or factor leading to the miner's death." 20 C.F.R. 718.205(c)(2). See lso 20 C.F.R. 718.205(c)(4) (survivors are not eligible for enefits where death is caused by a traumatic injury or a edical condition unrelated to pneumoconiosis, "unless * * pneumoconiosis was a substantially contributing ause of death"). The Director of the Office of Workers' ompensation Programs (OWCP), who administers the tatute on behalf of the Secretary, 20 C.F.R. 701.202(f), onsiders pneumoconiosis to be a "substantially contributing cause or factor" when it hastened a death that as predominantly caused by another condition.

2. In May 1983, Paul Shuff, a former miner, filed a laim for disability benefits against his former employer, etitioner Cedar Coal Co. Pet. App. 2a, 35a, 41a. Two onths later, before the claim was adjudicated, Mr. Shuff ied and, shortly thereafter, his widow, respondent Jewl Shuff, filed a claim for survivor's benefits. *Ibid.* After he claims were initially denied by a deputy commissioner in the Department of Labor's Office of Workers' ompensation Programs, Mrs. Shuff obtained a hearing efore an administrative law judge.

The ALJ found that Mr. Shuff had been totally disabled due to pneumoconiosis from April 1983, when he stopped work, until his death; accordingly, the ALJ awarded three months of benefits. Pet. App. 23a-25a, 30a-31a. Petitioner does not challenge the award of total disability benefits. See *id.* at 36a.

The ALJ also concluded, however, that the miner's death was not due to pneumoconiosis and accordingly denied Mrs. Shuff's claim for death benefits. With respect to the death benefits claim, the ALJ concluded that Mr. Shuff died from pancreatic cancer which had metastasized to other internal organs, although the immediate cause of death was pneumonia. Pet. App. 27a; see also *id.* at 9a. Thus, the "central question" for the ALJ was "whether pneumoconiosis was a substantially contributing cause of death because there is evidence that pneumoconiosis contributed to death insofar as it made the miner more susceptible to pneumonia, which was the immediate cause of death." *Id.* at 27a. The ALJ concluded that it was not such a cause. *Id.* at 29a. Although the ALJ recognized that pneumoconiosis may have "hastened" the miner's death by making him more susceptible to pneumonia, the ALJ did not make a definitive finding on this question, stating instead that cancer and cigarette smoking could also have increased Mr. Shuff's susceptibility and that the evidence linking pneumoconiosis and death was "somewhat extenuated." *Ibid.*

The Benefits Review Board affirmed. Pet. App. 40a-44a. It refused to apply the rule, adopted by the Director and affirmed in *Lukosevicz* v. *Director, OWCP*, 888 F.2d 1001 (3d Cir. 1989), that a death hastened by pneumoconiosis is compensable under the Black Lung Benefits Act. Pet. App. 42a & n.3.

3. The court of appeals reversed. Pet. App. 34a-39a. Noting that the Director's interpretation was entitled to

substantial deference, the court agreed with the decision in *Lukosevicz*, for the reasons stated by the Third Circuit in that case, that the Director reasonably interpreted "substantially contributing cause or factor" to include a condition that hastens a miner's death. *Id.* at 37a-38a. The court rejected petitioner's argument that the Director's interpretation reads "substantial" out of the regulation. In the court's view, the Director's interpretation gives "substance to the regulation" and provides a workable definition of "substantial." *Id.* at 38a.

But the court found it unclear whether the ALJ actually determined that pneumoconiosis hastened Mr. Shuff's death. Pet. App. 39a. Because the ALJ's opinion was inconclusive and the medical evidence in conflict, the court remanded for a finding on that issue. *Ibid.*

ARGUMENT

As an initial matter, petitioner offers no persuasive reason for the Court to depart from its usual practice of declining to review non-final orders of the courts of appeals. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A. R.R.*, 389 U.S. 327, 328 (1967). Since the ALJ may find on remand that pneumoconiosis did not hasten Mr. Shuff's death, review is not warranted at this time. In any event, the court of appeals correctly upheld the Director's interpretation of the applicable regulation. And not only does the court's decision not conflict with any decision of this Court or any other court of appeals, the two other courts of appeals to consider the issue have reached the same result as the court below. *Peabody Coal Co.* v. *Director, OWCP*, 972 F.2d 178, 183 (7th Cir. 1992); *Lukosevicz*, 888 F.2d at 1004-1006. Accordingly, further review is not warranted.

1. Petitioner does not argue that the Director incorrectly interpreted the statute, which calls for the pay-

ment of benefits "[i]n the case of death of a miner due to pneumoconiosis," 30 U.S.C. 922(a)(2), by providing in 20 C.F.R. 718.205(c)(2) that benefits are payable "[w]here pneumoconiosis was a substantially contributing cause or factor leading to the miner's death." Rather, petitioner argues that the Director has misconstrued the regulation, particularly the phrase "substantially contributing cause or factor," by concluding that it includes cases where pneumoconiosis hastens death but is not the predominant cause of death. Pet. 16-18.

The Director's interpretation of the regulation is reasonable. The regulations do not define "substantial" and the term has a number of meanings. In some instances, it means "having substance; material" or "[n]ot imaginary; real." *Webster's II New Riverside University Dictionary* 1155 (1988). It may also mean "of considerable importance, value, degree, amount, or extent." *Ibid.* When pneumoconiosis "hastens" a death—speeds up or accelerates an event that is inevitable for everyone—it has a real and material effect on a person's lifespan. It therefore "substantially contributes" to a death, whether or not it is the predominant cause. See 2 Restatement (Second) of Torts § 431 comment a (1965) (using "substantial cause" to distinguish conduct producing an effect that would "lead reasonable men to regard it as a cause" from causes in the "philosophical sense," many of which produce such insignificant effects "that no ordinary mind would think of them as causes").

Petitioner does not dispute that "substantial" may mean "real" or "material." Instead, petitioner contends that cases construing a different statutory provision—the provision providing for benefits "[i]n the case of total disability of a miner due to pneumoconiosis," 30 U.S.C. 922(a)(1)—show that "substantially" should have a "more demanding" meaning. Pet. 18. But those disability cases

do not call into question the Director's conclusion that pneumoconiosis is a "substantially contributing cause or factor" leading to death when it hastens, but is not the predominant cause of, death. As an initial matter, there is no disability regulation analogous to 20 C.F.R. 718.205(c), the provision at issue here. Instead, some courts have themselves articulated a "substantially contributing" standard to determine whether a disability is "due to" pneumoconiosis. Those courts have construed "substantially" in a manner that is similar to the way the Director interprets it in 20 C.F.R. 718.205(c)(2). See *Bonessa* v. *United States Steel Corp.*, 884 F.2d 726, 728, 734 (3d Cir. 1989); *Lollar* v. *Alabama By-Prods. Corp.*, 893 F.2d 1258, 1265 (11th Cir. 1990). Other courts have rejected a "substantially contributing" standard for disability causation because they believed it *could* be construed the way petitioner proposes: to require an unspecified and difficult inquiry into the degree to which pneumoconiosis contributes to a disability. See *Robinson* v. *Pickands Mather & Co.*, 914 F.2d 35, 38-39 (4th Cir. 1990); *Hawkins* v. *Director, OWCP*, 907 F.2d 697, 705 (7th Cir. 1990); *Mangus* v. *Director, OWCP*, 882 F.2d 1527, 1531 (10th Cir. 1989). In short, none of those cases suggests that it would be appropriate to apply a "demanding" causality analysis in black lung cases.

2. Petitioner also argues that the Director's interpretation of the regulation is not entitled to deference because it "fails the test of consistency." Pet. 9-11. Specifically, petitioner argues that the Director's interpretation was first advanced more than five years after the regulation was promulgated and is inconsistent with other pronouncements of the Director. In fact, the Director advanced his interpretation in 1986, three years after the regulation was promulgated, in a brief to the Benefits Review Board in *Clark* v. *Director, OWCP*,

9 Black Lung Rep. (MB) 1-205 (1986), aff'd in part and rev'd in part, 838 F.2d 197 (6th Cir. 1988), and has consistently adhered to it.[1] Nor is it relevant that the Benefits Review Board rejected the Director's interpretation, because the Board is an adjudicatory tribunal, separate from the Director, see 33 U.S.C. 921(b); 20 C.F.R. 801.102(a)(6), whose views are entitled to no deference. See, *e.g.*, *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980); *Lukosevicz*, 888 F.2d at 1005-1006. In short, the Director's consistent interpretation of the Department's regulation is entitled to deference.

3. Petitioner also argues that the Director's interpretation does not "conform to the purpose of 20 C.F.R. § 718.205(c)." Pet. 11-16. To the contrary, the Director's interpretation fulfills the intent of the drafters of the 1981 amendments to the Black Lung Benefits Act. In those amendments, Congress eliminated a provision allowing the payment of death benefits whether or not a miner's death was due to pneumoconiosis, but Congress did not mandate a

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[1] In arguing that the Director has been inconsistent, petitioner cites positions the Director took in litigating when a *disability* is "due to pneumoconiosis." Pet. 9-10. Those positions are largely irrelevant to the dispute in this case. In any event, although the Director at one time argued that a disability was "due to" pneumoconiosis when pneumoconiosis was "in and of itself" disabling, the Director construed that standard to allow a claimant to obtain benefits by proving that pneumoconiosis, *as defined in 20 C.F.R. 718.201*, was "in and of itself" disabling. Because that definition of "pneumoconiosis" broadly includes any chronic pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," the Director's interpretation called for an award of benefits when any of a wide variety of impairments was totally disabling. See *Mangus*, 882 F.2d at 1530.

"demanding" inquiry into the extent to which pneumoconiosis contributed to the death. A fair interpretation of the comments of the congressional sponsors is that they thought that benefits should be awarded if pneumoconiosis was either *the* cause of death or a "substantially contributing factor." See 127 Cong. Rec. 31,747 (1981) (Rep. Perkins); *id.* at 31,978 (Sen. Hatch). They did not suggest that survivors should not receive benefits where pneumoconiosis hastened a death; rather, they intended survivors to be ineligible "where death was caused by a traumatic injury or an unrelated medical condition." *Id.* at 31,747 (Rep. Perkins); *id.* at 31,978 (Sen. Hatch). Consistent with those statements, the Department provided in 20 C.F.R. 718.205(c)(2) that death benefits would be payable if pneumoconiosis was "a substantially contributing cause or factor leading to the miner's death."[2]

The Department did not define "substantial," but it did emphasize that "pneumoconiosis need not [be] the 'principal', sole, primary or proximate cause of the miner's death in order for the survivor's claim to be compensable." 48 Fed. Reg. 24,277, para. n (1983). Construing "substantially contributing" cause to mean a

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[2] Petitioner notes that the "substantially contributing" standard was selected in place of a "significantly related to or aggravated by" standard, and argues that the Department therefore must have intended "substantially contributing" to be "demanding." Pet. 15-16. That does not follow. The Department eliminated the "significantly related to or aggravated by" standard largely because the Benefits Review Board, in a decision the Department thought was wrongly decided, had invalidated the Department's use of an "aggravation" standard. 48 Fed. Reg. 24.277 para. k (1983); *id.* at 24,276 para. g. It selected the "substantially contributing" standard because that was the phrase used by the congressional sponsors of the 1981 amendments.

"material or real" cause is consistent with the intent of the Department and Congress. See *Lukosevicz*, 888 F.2d at 1004-1006. Petitioner's alternative definition is inconsistent with Congress's intent, as understood by the Department when it promulgated the regulations applying the 1981 amendments, because petitioner seeks to resurrect the concepts of principal, primary, or proximate cause that the Department rejected. See *Robinson* v. *Pickands Mather & Co.*, 914 F.2d 35, 38-39 (4th Cir. 1990); *Compton* v. *Inland Steel Coal Co.*, 933 F.2d 477, 492 (7th Cir. 1991) (Coffey, J., concurring).[3]

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[3] Petitioner argues, Pet. 15-16, that the Department endorsed a "demanding" standard by eliminating a regulation allowing death benefits where death was due to multiple causes and it was "not medically feasible to distinguish which disease caused death or the extent to which pneumoconiosis contributed to the cause of death." 20 C.F.R. 718.205(b)(2). But that regulation was repealed because it applied a presumption repealed by the 1981 amendments, see 30 U.S.C. 921(c)(2). The regulation was not repealed because the Department thought that the demanding standard petitioner seeks to apply is appropriate. See 48 Fed. Reg. 24,278 para. p (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1992